TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 28

SUN INSURANCE OFFICE, PETITIONER,

vs.

J. M. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,701)

(35,701)

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Judd & Detweiler (Inc.), Printers, Washington, D. C., July 21, 1931

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TRANSCRIPT OF RECORD

In the District Court of the United States, Southern District of Ohio, Eastern Division.

J. M. Scott, Plaintiff.
vs.
The Sun Insurance Office, Defendant.
No. 2563.

TRANSCRIPT ON REMOVAL—Filed February 24, 1927.

In the Common Pleas Court of Guernsey County, Ohio.

J. M. Scott, Plaintiff, against Sun Insurance Office, Defendant.

Petition.

Defendant is a corporation, incorporated under the laws of some other state, or foreign country, and at all the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

On the 14th day of June, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, and at least one hundred and forty-four (144) wool bags, contained in the two story, slate roof, frame building, occupied as wool storage, situated on the west side of Cambridge Street, in the Village of Cumberland, County of Guernsey and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 14th day of June, 1926, in consideration of $73.02, annual premium, paid by plaintiff, defendant, by its policy of insurance No. 0288271 insured plaintiff against loss by fire to the amount of $5750.00, on said unwashed wool and on said wool sacks from the 14th day of June, 1926, at noon, to the 14th day of June, 1927, at noon.

Plaintiff says there was other concurrent insurance

on the aforesaid property as permitted under the terms of said policy in the sum of $22,250.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, all the aforesaid personal property was totally destroyed by fire.

On or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as next hereinafter stated, to wit: Said policy contained the following provision as a part thereof, to wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

After said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and at said time defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy attached to and forming part of policy No. 0288271 of the Sun Insurance Office, Chicago, Ill., issued

at its Cumberland, Ohio, agency. Dated June 24th, 1926.

J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay to plaintiff his loss as covered by said policy, or any part thereof, although requested so to do.

Wherefore, plaintiff prays judgment against defendant in the sum of $5750.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott.
By A. R. McCulloch,
W. W. Stewart and
James Joyce,
His Attorneys

Precipe.

To the Clerk of Courts: Issue summons to the Sheriff of Guernsey County, for the defendant, returnable according to law. Endorse thereon, "Action for money only, amount claimed $5750.00, with interest from September 6th, 1926, and for costs of suit."

A. R. McCulloch,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

[Duly verified.]

Summons.

The State of Ohio, Guernsey County. Common Pleas Court—To the Sheriff of said County:

You are hereby commanded to notify Sun Insurance Office that they have been sued by J. M. Scott in the Court of Common Pleas of said Guernsey County, and must answer by the 29th day of January A. D. 1927, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said Sheriff will make due return of this summons on the 10th day of January, 1927.

Witness my hand and the seal of said Court, this 30th day of December, 1926.

Thomas H. Snider,
Clerk.

[Seal.]

Transcript of Removal.

Sheriff's Return.

The State of Ohio, Guernsey County.

Received this writ December 30th, 1926, at 10 o'clock A. M. And on —— 192—, I served the within named Sun Insurance Office, by personally handing to true and certified copy of this writ with all the endorsements thereon to J. M. Bracken, Agent of the Sun Insurance Co. There being no president or other chief officer found within my County. Sheriff's fees, $4.59.

Ed W. Wilson,
Sheriff.

By Thos. E. Gracy,
Deputy.

Notice of Petition and Bond for Order of Removal.

To A. R. McCulloch, W. W. Stewart and James Joyce, Attorneys for Plaintiff:

Please take notice that the defendant, Sun Insurance Office, will on Monday, the 31st day of January, 1927, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of Ohio, Eastern Division, in accordance with the petition and bond of defendant, copies of which are hereto attached.

Dated 28th day of January, 1927.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

We acknowledge service upon us this 28th day of January, 1927, of the above notice, together with a copy of the petition and bond, for removal filed in the above case by the defendant, Sun Insurance Office.

James Joyce, W. W. Stewart & A. R. McCulloch,
Attorneys for Plaintiff.

Petition to Remove.

The petition of the Sun Insurance Office of London, the above named defendant, respectfully shows to this court as follows:

That your petitioner is the defendant in the above entitled action;

That the above entitled action is brought by the plaintiff to recover of this defendant petitioner the sum of $5750.00 with interest from the 6th day of September, 1926, upon a policy of insurance issued by this defendant petitioner by reason of an alleged fire loss to property described in said policy;

That said action is wholly of a civil nature;

That the matter and the amount in dispute in said

suit, exclusive of interest, exceed the sum of value of $3000.00, all of which will more fully appear in the petition in said action which is hereby referred to and made a part hereof;

That the controversy herein is between citizens of a state and of a foreign country;

That said defendant, Sun Insurance Office of London, is a foreign corporation and was at the time of the commencement of said suit and still is a non-resident and not a citizen of said State of Ohio; but was then and still is an alien and a citizen and subject of the United Kingdom of Great Britian and Ireland, and was then and still is a corporation duly formed, created and organized under and by virtue of the laws of the United Kingdom of Great Britian and Ireland, and was then and still is a citizen and resident of said United Kingdom of Great Britian and Ireland, having its principal place of business in the City of London, England.

That said plaintiff, J. M. Scott, was at the time of the commencement of said suit and still is a citizen and resident of the State of Ohio and of the County of Guernsey of said State of Ohio, in the Southern District of Ohio, Eastern Division of said State.

That there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner and the plaintiff;

That the time within which this defendant is required by the laws of the State of Ohio to plead or answer herein has not yet expired and your petitioner has not yet appeared or answered or otherwise pleaded in this action;

That your petitioner herein presents a good and sufficient bond and surety as provided by the statute in such cases, conditioned that this petitioner will enter into such District Court for the Southern District of Ohio, Eastern Division, within thirty days from the filing of this petition, a certified copy of the record in this suit and for the payment of all costs which may be awarded by said Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented

herewith, and direct a transcript of the record herein to be made to said Court as provided by law.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

Bond On Removal.

Know All Men By These Presents, That the Sun Insurance Office of London, as principal, and The Great American Indemnity Company of New York, a corporation, as surety, are held and firmly bound unto the above named plaintiff, J. M. Scott, his Executors, Administrators and Assigns, jointly and severally, in the sum of Five Hundred Dollars ($500.00) for the payment of which well and truly to be made, we and each of us, bind ourselves and our successors, jointly and severally by these presents.

The conditions of the above obligation are such that:

Whereas, the said Sun Insurance Office of London has applied by petition to the Court of Common Pleas of Guernsey County, Ohio, for the removal of a certain cause therein pending, wherein J. M. Scott is plaintiff and Sun Insurance Office of London is defendant, to the District Court of the United States for the Southern District of Ohio, Eastern Division, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Common Pleas Court be stayed.

Now, Therefore, if the said Sun Insurance Office of London shall enter into said District Court of the United States for the Southern District of Ohio, Eastern Division, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded therein by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

In Witness Whereof the said parties have caused their respective names to be subscribed hereto, this the 27th day of January, 1927.

Sun Insurance Office of London.
By R. M. Edmonds,
Solicitor.

The Great American Indemnity Co. of New York.
By Frank J. Macklin,
Attorney in Fact.

Amended Petition.
Clerk's Certificate.

I, Thomas H. Snider, Clerk of the Court of Common Pleas within and for said County, and in whose custody the files, journals, and records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing—

Petition and Precipe, filed 12-29-26

Summons issued, 12-30-26

General Continuance of Oct. Term 1926, Jour. 49, P. 355

Summons returned and filed 1-8-27

Petition, Bond for Removal, Notice and Acknowledgment of Service, filed 1-29-27

Journal Entry under date of January 31, 1927, as follows:

"Application for order of removal to Federal Court is hereby sustained and granted"

Cost Bill Filed 2-11-27

are taken and copied from the original now on file in said Court, that the foregoing have been compared by me with said original documents and that the same are true and correct copies thereof.

In Testimony Whereof, I hereunto subscribe my name officially and affix the seal of said Court, at the Court-house, in Cambridge, Ohio, in said County, this 11th day of February, A. D. 1927.

Thomas H. Snider,
Clerk of said Common Pleas Court,
By Stella Bliss Wheeler,
Deputy.

AMENDED PETITION—Filed October 13, 1927.

Defendant is a corporation, incorporated under the laws of some other state, or foreign country, and at all the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

Amended Petition.

On the 14th day of June, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, of the worth and value of $28,700.00, and at least one hundred and forty-four (144) wool bags, of the worth and value of $57.60, all of the value of $27,757.60, contained in the two story, slate roof, frame building, occupied as a wool storage building, situated on the west side of Cambridge Street, in the Village of Cumberland, Guernsey County, and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 14th day of June, 1926, in consideration of $73.02, annual premium, paid by plaintiff, defendant, by its policy of insurance No. C288271 insured plaintiff against loss by fire to the amount of $5750.00 on said unwashed wool and on said wool sacks from the 14th day of June, 1926, at noon, to the 14th day of June, 1927, at noon.

Plaintiff says there was other concurrent insurance on the aforesaid property as permitted under the terms of said policy in the sum of $22,250.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, and while the aforesaid personal property was located in the aforesaid building hereinbefore described, and while said personal property consisted of the amount and was of the value hereinbefore stated, all of the aforesaid personal property was totally destroyed by fire, to plaintiff's damage in the sum of $28,757.60.

On or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as next hereinafter stated, to wit: Said policy contained the following provision as a part thereof, to wit:

Amended Petition.

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

After said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and at said time defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of policy No. C288271 of the Sun Insurance Office, Chicago, Ill., issued at its Cumberland, Ohio, agency. Dated June 24, 1926.

J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay plaintiff his loss, as covered by said policy, or any part thereof, for such damages, so sustained by plaintiff, by reason of the destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant by reason of the premises herein, the sum of $5750.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

Wherefore, plaintiff prays judgment against defend-

ant in the sum of $5750.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott,
By W. W. Stewart,
A. R. McCullough,
Elwood Murphy and
James Joyce,
His Attorneys.

[Duly verified.]

ANSWER TO AMENDED PETITION—Filed November 12, 1927.

First Defense:

Now comes the defendant, Sun Insurance Office of London, England, and for its first defense to plaintiff's amended petition admits that this defendant is a corporation duly incorporated under the laws of a foreign country, and at all times mentioned in the amended petition was duly authorized to issue insurance against loss by fire in Guernsey county, Ohio.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the amended petition and denies that said wool and wool bags and each of them referred to in the amended petition contained in said frame building referred to in said amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seventy Thousand pounds of unwashed wool or was of the quantity of One Hundred and Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said wool bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the amended petition on the 6th day of September, 1926, was very much less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

Answer to Amended Petition.

This defendant denies that by said policy referred to in the amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary, this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or not or by solvent or insolvent insurers covering such property.

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

This defendant denies that on September 6, 1926, said personal property referred to in the amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was

in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the amended petition, and denies that said personal property referred to in the amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the amended petition either on the 6th day of September, or at any other time, in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the defendant the pounds of said unwashed wool and the number of said wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed all or any of the conditions of said policy on plaintiff's part to be performed more than sixty days prior to the bringing of this action, or at any other time.

This defendant admits that said policy of insurance contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

This defendant admits that the plaintiff did not perform or comply with the said provisions contained in said policy last hereinbefore quoted. This defendant denies that any other agreement than that contained in said policy of insurance was ever made between this defendant and the plaintiff. This defendant admits that after said policy was made and delivered to plaintiff a chattel mortgage on a part of the aforesaid personal property referred to and described in the amended pe-

tition and described in said policy of insurance was executed and delivered by the plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execution and delivery of said chattel mortgage, or at any time thereafter up until long after said fire, this defendant knew or had any knowledge whatever that said aforesaid personal property was encumbered by chattel mortgage, or that the plaintiff's ownership of said personal property was subject to said chattel mortgage.

This defendant denies that plaintiff's ownership to said personal property or any part thereof was sole and unconditional as to any or all of said personal property.

This defendant admits that there was attached to said policy of insurance and made a part thereof a loss payable clause in the following words and figures, to-wit:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy attached to and forming part of policy No. C288271 of the Sun Insurance Office, Chicago, Ill., issued at its Cumberland, Ohio, Agency. Dated June 24th 1926."

This defendant denies that the plaintiff is or has ever been excused or relieved in any manner whatsoever or in any respect whatsoever by defendant concerning any matters and things, or any part thereof, including the performance of the conditions of said policy alleged in the amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained, among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept. 6, 1926, to property located at in rear lot — W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement."

Answer to Amended Petition.

"Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power of authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

"The sole object and intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto."

This defendant denies each and every allegation and averment in plaintiff's amended petition contained which is not herein expressly or specifically admitted or denied.

Second Defense:

This defendant for its second defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing

by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture

thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This defendant alleges that the plaintiff utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy.

This defendant alleges that the plaintiff utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy. This defendant alleges that the plaintiff utterly failed within sixty days after said fire, as required by the above quoted conditions contained in said policy, and at all other times to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon; all other insurance whether valid or not covering any of said property, and the other matters of information required by the above quoted conditions contained in said policy; that the plaintiff utterly failed within sixty days after said fire and at all other times to make and render to this defendant due proofs of said loss, as required by the above quoted conditions contained in said policy.

This defendant alleges that subsequent to said fire the plaintiff and this defendant disagreed as to the amount of loss caused by said fire to this property described in said policy; that the amount of loss caused by said fire to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Third Defense:

This defendant for its third defense to plaintiff's amended petition makes each and all of the admissions

Answer to Amended Petition.

averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described in said policy was not truly stated in said policy.

This defendant alleges that at the time of the said fire and for some time prior thereto the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership that at the time of said fire and for some time prior thereto a person, firm or corporation other than the plaintiff had title to or interest in said property or a part thereof described in said policy of insurance; that subsequent to the delivery and acceptance of said policy of insurance said personal property or a part thereof, which was the subject of insurance described in said policy became incumbered by a chattel mortgage executed by the plaintiff, which chattel mortgage remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title to or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof, which was the subject of insurance described in said policy be or become incumbered by a chattel mortgage, or in any manner altering any of the above quoted conditions contained in said policy.

Fourth Defense:

This defendant for its fourth defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a

part of this, its fourth defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

This defendant alleges that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to this defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored; whereas in truth and fact, as the plaintiff then well knew, said fire did not originate by lightning striking said building.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact, as the plaintiff then well knew, another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to or an interest in said wool or a part thereof located in said building at the time of said fire.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least Seventy Thousand Pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire; that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact, as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand Pounds, and whereas, in truth and fact, as the plaintiff then well knew, the actual cash value of such wool

as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said fire plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact, as the plaintiff then well knew, many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew, an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to the defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore this defendant prays that it may be dismissed from this action with a judgment for its costs herein expended.

Scott & Scott,
Cambridge, Ohio,
Mooney, Bibbee & Edmonds,
Columbus, Ohio,
Attorneys for Defendant.

[Duly verified.]

SECOND AMENDED PETITION—Filed January 28, 1928.

Plaintiff, having first received leave of court to file this, his second amended petition, says that the defendant is a corporation, incorporated under the laws of the State of New York, and at all times hereinafter mentioned, was duly authorized to issue insurance against loss of fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

That on the 14th day of June, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, of the worth and value of $28,700.00 and at least one hundred and forty-four (144) wool bags, of the worth and value of $57.60, all of the value of $28,757.60, contained in the two story, slate roof, frame building, occupied as a wool storage building, situated on the west side of Cambridge Street in the Village of Cumberland, Guernsey County, and State of Ohio, and occupied by assured during said time as a wool storage building.

That on the 14th day of June, 1926, in consideration of $73.02 annual premium, paid by plaintiff, the defendant, by its policy of insurance No. C288271, insured plaintiff against loss by fire to the amount of $5750.00, on said unwashed wool and on said wool sacks from the 14th day of June, 1926, at noon, to the 14th day of June, 1927, at noon.

Plaintiff says there was other concurrent insurance on the aforesaid property, as permitted under the terms of said policy in the sum of $22,250.00.

That on said 6th day of September, 1926, while said policy of insurance was in full force, and while the aforesaid personal property was located in the aforesaid building hereinbefore described, and while said personal property consisted of the amount and was of the value hereinbefore stated, all of the aforesaid personal property was totally destroyed by fire, to plaintiff's damage in the sum of $28,757.60.

That on or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant plaintiff furnished and delivered to defendant true copies of all

surance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as hereinafter stated to wit:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be * * * personal property and be or become incumbered by a chattel mortgage."

When said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, on or about the 19th day of June, 1926, and defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy as set forth herein.

A copy of said "Loss Payable Clause" on said policy of insurance is as follows:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire." * * * and the loss shall not become payable until

sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

That plaintiff was not asked for an appraisement for the following reasons:

That on or about the 15th day of September, 1926, the defendant, through its adjuster, to wit, A. C. Harrod, being the agent in charge of said loss under said policy, said to the plaintiff, and notified the plaintiff, that said property destroyed by fire was a total loss, and that there was no property to appraise.

Plaintiff further alleges that the defendant never made any demand or any requirement for an appraisement of said loss of the property.

Plaintiff further alleges that the defendant, at no time, named an appraiser for the defendant, or requested an appraisement to be made or an appraiser to be appointed by the plaintiff, by reason of the provisions of said policy or otherwise.

Plaintiff further says that the defendant, through its said adjuster, wholly waived any appraisement of said total loss and waived the selection of an appraiser, by the following demands, requirements and contract with the plaintiff, to wit:

That after the said plaintiff had exhibited to the adjuster the destroyed premises, and given a full statement of the amount of the contents of the said wool barn, and the prices and quantity of wool that had been then and there destroyed by said fire, the said adjuster made the following proposition to plaintiff, to wit:

"All the additional proof I will require of you, is for you to procure for the defendant company an itemized statement of the amount of pounds of wool and the dates of the sales of the same and by whom sold to you, and that will be sufficient. That if said list of farmers and wool growers and said sales to you amounted to seventy thousand pounds of wool, or more, (being the same amount that the plaintiff was claiming or claimed as a total loss), that he, the said adjuster, would at once check up such list of farmers and wool growers for said defendant company on his return to plaintiff's residence at Cumberland, Ohio, where said fire took place, and if said list would show a loss, as claimed by plaintiff, that it would be satisfactory to the defendant company for proof of loss, and there would be no further trouble about the adjustment of the loss to plaintiff, under said policy.

and that the defendant company would at once pay the same."

Said adjuster further stated to plaintiff, then and there, that while plaintiff was procuring said data, so requested, that the plaintiff would get the usual letter from the defendant company, and that he, said adjuster, would come back after plaintiff had received such usual letter and check up such list, and further represented to plaintiff that this would be all plaintiff had to do.

Plaintiff thereupon explained to said adjuster, so representing the defendant company, that many of such farmers and wool growers lived far from Cumberland, Ohio, and in several counties, and the books and records of such sales, including the addresses of said farmers, were in the office located in the building which was then and there burned. Plaintiff further explained to the said adjuster that it would require the help of his son who had knowledge of these farmers and wool growers and who knew of their addresses and perhaps with the help of others, he could make out such a list by calling directly upon such farmers and wool growers. Thereupon the said adjuster insisted upon plaintiff going to said expense and to spending his time and the time of his son, in making this particular kind of proof for the benefit of said defendant company.

Plaintiff further says that by reason of the great number of such vendors and distance of said vendors, from Cumberland, Ohio, and owing to the conditions of the roads, it required upwards of forty days of time and expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

Plaintiff further says that at the end of said period, he had complied with the request and demand of the defendant company by making said calls and procuring the individual signatures to said schedules of all of said amounts and sales, which totalled in excess of the amount of wool established by the proof and loss theretofore made to said adjuster, and which was in full compliance with the request and demand of said defendant company.

Plaintiff further says that he expended in time and money in so procuring the aforesaid data, as requested by the defendant, more than $200.00, the exact amount plaintiff is unable to definitely state; that plaintiff fully completed the work of so securing the names of said persons and the signatures, together with the amount of wool so sold and delivered to him and so burned as speedily as was possible to accomplish the same, and at as

reasonable an expense as the same could be performed.

Plaintiff further says that he has had in his possession all the aforesaid information at Cumberland, Ohio, in accordance with his agreement, and has ever been ready to submit the same to the adjuster for his verification and to check up the same, as was then and there and theretofore agreed to be done by him.

Plaintiff is still ready and willing to do so, notwithstanding the defendant company has failed and refused to call for said information or accept the same as it had then and there agreed to do.

Defendant, after plaintiff complied with the defendant's aforesaid request, wholly failed to call for the list of the names of the farmers and wool growers so individually signed by the farmers and wool growers and wholly failed to call for said schedule of sales, as was agreed to, and has ever since refused payment of said loss, both before and after suit was filed.

Defendant is therefore estopped to claim any other or different proofs or appraisement other than the aforesaid contract or requirement, fully complied with on the part of said plaintiff.

Defendant well knew that plaintiff was collecting said data and expending said money, and permitted plaintiff to be tolled along, believing and knowing that plaintiff was then and there relying upon said request and acting thereon in good faith, when it requested additional proof of loss, and the amount thereof in this form.

Plaintiff further says, on the faith of said premises, he performed all of said services and expended said money, as aforesaid, and not otherwise.

By reason whereof, the defendant has wholly waived the conditions of said policy requiring any other additional proof of loss from plaintiff and waived any other requirement of appraisement or any other condition on said policy.

Plaintiff further says that he is and ever has been excused and relieved from furnishing further proof in all respects touching or relative to said matters and things required in said policy in respects to said appraisement or any further proof of loss, including any other or further conditions of said policy in establishing or agreeing to establish the quantity of wool so destroyed by fire.

That said defendant is therefore wholly estopped from requiring or demanding of said plaintiff any further appraisement or proof of loss of said wool.

Defendant has failed and refused to pay plaintiff his

loss, as covered by said policy, or any part thereof, for such damages, so sustained by plaintiff, by reason of the destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant by reason of the premises herein, the sum of $5750.00 with interest thereon from the 6th day of September, 1926, and costs of suit.

Wherefore plaintiff prays judgment against defendant in the sum of $5750.00 with interest thereon from the 6th day of September, 1926, and for costs of suit.

F. S. Monett,
Elwood Murphy,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

[Duly verified.]

ANSWER TO SECOND AMENDED PETITION—Filed February 25, 1928.

First Defense:

Now comes the defendant, Sun Insurance Office of London, England, and for its first defense to plaintiff's second amended petition admits that this defendant is a corporation duly incorporated under the laws of a foreign country, and at all times mentioned in the second amended petition was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the second amended petition and denies that said wool and wool bags and each of them referred to in the second amended petition contained in said frame building referred to in said second amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seventy Thousand pounds of unwashed wool or was of the quantity of One Hundred and

Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said wool bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the second amended petition on the 6th day of September, 1926, was very much less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

This defendant denies that by said policy of insurance referred to in the second amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire, to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the second amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or not or by solvent or insolvent insurers covering such property.

"This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such

power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

This defendant denies that on September 6, 1926, said personal property referred to in the 2d amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the second amended petition, and denies that said personal property referred to in the second amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the second amended petition either on the 6th day of September, or at any other time, in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the defendant the pounds of said unwashed wool and the number of said wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed all or any of the conditions of said policy on plaintiff's part to be performed more than sixty days prior to the bringing of this action, or at any other time.

This defendant admits that said policy of insurance contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insur-

ance be personal property and be or become incumbered by a chattel mortgage."

This defendant admits that the plaintiff did not perform or comply with the said provisions contained in said policy last hereinbefore quoted. This defendant denies that any other agreement than that contained in said policy of insurance was ever made between this defendant and the plaintiff. This defendant admits that before said policy was made and delivered to plaintiff a chattel mortgage on a part of the aforesaid personal property referred to and described in the second amended petition and described in said policy of insurance was executed and delivered by the plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execution and delivery of said chattel mortgage, or at any time thereafter up until long after said fire, this defendant knew or had any knowledge whatever that said aforesaid personal property was encumbered by chattel mortgage, or that the plaintiff's ownership of said personal property was subject to said chattel mortgage.

This defendant denies that plaintiff's ownership to said personal property or any part thereof was sole and unconditional as to any or all of said personal property.

This defendant admits that there was attached to said policy of insurance and made a part thereof a loss payable clause in the following words and figures, to-wit:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy attached to and forming part of policy No. C288271 of the Sun Insurance Office, Chicago, Ill., issued at its Cumberland, Ohio, Agency. Dated June 24th 1926."

This defendant denies that the plaintiff is or has ever been excused or relieved in any manner whatsoever or in any respect whatsoever by defendant concerning any matters and things, or any part thereof, including the performance of the conditions of said policy alleged in the second amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant admits that the plaintiff has not asked for an ascertainment of the amount of said loss.

This defendant denies that this defendant ever through any adjuster, or through one A. C. Harrod, or through any agent in charge of said loss under said

policy, or otherwise, at any time said to the plaintiff, or notified the plaintiff that said property claimed to have been destroyed by fire was a total loss, or that there was no property to appraise.

This defendant denies that this defendant never made any requirement for an appraisement of said loss to said property.

This defendant denies that this defendant through said alleged adjuster, or otherwise, wholly waived, or waived at all or is estopped to insist upon any appraisement of said loss, or waived the selection of an appraiser, either by said alleged demands, alleged requirements, or alleged contracts referred to in the second amended petition, or otherwise.

This defendant denies that the plaintiff ever at any time exhibited to this defendant, or its adjuster, said destroyed or damaged premises, or ever at any time gave a full statement of the amount of the contents of said barn, or of the prices, or of the quantity of wool that had been, or were damaged or destroyed by said fire, and denies that said alleged adjuster, or any adjuster of the defendant, made said alleged proposition to the plaintiff set forth in said second amended petition, or stated to the plaintiff that all any adjuster would require of plaintiff was to procure for the defendant company an itemized statement of the amount of pounds of wool and of the dates of sale of same, and by whom sold to the plaintiff, or ever at any time stated that such itemized statement would be sufficient.

This defendant denies that this defendant through any adjuster, or otherwise, ever at any time stated to the plaintiff that if said list of farmers and wool growers and said sales to plaintiff amounted to Seventy Thousand pounds of wool, or more, that any adjuster of this defendant would at once check up such list of farmers and wool growers for said defendant company on his return to plaintiff's residence at Cumberland, Ohio, or that he would return at all to plaintiff's residence at Cumberland, Ohio, or that if said list would show a loss as claimed by plaintiff that it would be satisfactory to the defendant company for proof of loss, or that there would be no further trouble about the adjustment of the loss to plaintiff under said policy, or that the defendant company would at once pay the same, and denies that this defendant ever, through any adjuster, or otherwise, made any of said statements in substance or form as alleged in the second amended petition.

This defendant denies that said alleged adjuster, or

this defendant, stated to the plaintiff then and there, or at any other time, that while plaintiff was procuring said data so requested that the plaintiff would get the usual letter from the defendant company, or any letter from the defendant company; or that said alleged adjuster would come back after the plaintiff had received such usual letter, or any letter, and check up such list, or ever at any time represented to the plaintiff that this would be all that the plaintiff had to do.

This defendant denies that the plaintiff thereupon, or at any time, explained to said alleged adjuster that many of said farmers and wool growers lived far from Cumberland, Ohio, or in several counties.

This defendant denies that the plaintiff explained to any adjuster of this defendant that it would require the help of plaintiff's son, or perhaps the help of others, to make out said alleged list by calling directly upon said farmers or wool growers, and denies that any adjuster of this defendant insisted upon plaintiff going to any expense or spending plaintiff's time or that of his son in making said particular alleged form of proof either for the benefit of the defendant, or otherwise.

The defendant denies that it required upwards of forty days of time or expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

This defendant denies that at the end of said period, or at any time, the plaintiff complied with any request or demand of the defendant, or procured or made said calls and procured the individual signatures to said alleged schedule of all of said alleged amounts and sales, with the knowledge of the defendant, or otherwise, and denies that said alleged schedule totalled in excess of the amount of wool set forth in any proof of loss theretofore made to any adjuster of this defendant, and denies that any alleged schedule was in full compliance with any request or demand of this defendant company.

This defendant denies that plaintiff expended the sum of $200.00 in procuring said alleged data. Defendant denies that the plaintiff completed the work if any of securing the names of said persons and said signatures, together with the amount of wool so sold and delivered to the plaintiff and claimed to have been burned as speedily as possible to accomplish same.

This defendant denies that the plaintiff has had in his possession said alleged information at Cumberland, Ohio, in accordance with any agreement, or otherwise, or that the plaintiff has ever been ready, or at any time ready,

to submit the same to any adjuster of this defendant, and denies that this defendant has ever at any time agreed to call for, or accept, said alleged information.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated and Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept. 6, 1926, to property located at in rear lot — W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement."

"Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

"The Sole object and intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto."

This defendant denies that this defendant ever knew that the plaintiff was collecting any data or expending any money, and denies that this defendant permitted the plaintiff to be tolled along, or that the defendant believed or knew that the plaintiff was relying upon any request, or acting thereon in good faith, and denies that on the faith of any promises plaintiff performed any services or expended any money, or that the defendant has waived the conditions of said policy requiring any other additional proofs of loss from the plaintiff, or that the defendant has waived any other requirement of appraisement or other conditions of said policy, or that the defendant is estopped to assert any condition of said policy.

This defendant denies each and every allegation and averment in plaintiff's second amended petition contained which is not herein expressly or specifically admitted or denied.

Answer to Second Amended Petition.

Second Defense:

This defendant for its second defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; and changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if re-

quired, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This defendant alleges that the plaintiff utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy.

Answer to Second Amended Petition.

This defendant alleges that the plaintiff utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy. This defendant alleges that the plaintiff utterly failed within sixty days after said fire, as required by the above quoted conditions contained in said policy, and at all other times, to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the above quoted conditions contained in said policy; that the plaintiff utterly failed within sixty days after said fire and at all other times to make and render to this defendant due proofs of said loss, as required by the above quoted conditions contained in said policy.

This defendant alleges that subsequent to said fire the plaintiff and this defendant disagreed as to the amount of loss caused by said fire to this property described in said policy; that the amount of loss caused by said fire to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Third Defense:

This defendant for its third defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described

in said policy was not truly stated in said policy.

This defendant alleges that at the time of the said fire and for some time prior thereto the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership that at the time of said fire and for some time prior thereto, a person, firm or corporation other than the plaintiff had title to or interest in said property or a part thereof described in said policy of insurance; that subsequent to the delivery and acceptance of said policy of insurance said personal property or a part thereof, which was the subject of insurance described in said policy became incumbered by a chattel mortgage, executed by the plaintiff, which chattel mortgage remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title to or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof, which was the subject of insurance described in said policy be or become incumbered by a chattel mortgage, or in any manner altering any of the above quoted conditions contained in said policy.

Fourth Defense:

This defenant for its fourth defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its fourth defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

This defendant alleges that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to this defendant under oath that according to the plaintiff's best judgment and belief said fire originated by

lightning striking the building in which said alleged wool was stored; whereas in truth and fact, as the plaintiff then well knew said fire did not originate by lightning striking said building.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact as the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio had title to or an interest in said wool or a part thereof located in said building at the time of said fire.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least Seventy Thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire; that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand pounds, and whereas, in truth and fact as the plaintiff then well knew the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said fire plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact as the plaintiff then well knew many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong

Reply.

and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to the defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore, this defendant prays that it may be dismissed from this action with a judgment for its costs herein expended.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

REPLY—Filed March 10, 1928.

Now comes the plaintiff, J. M. Scott, and for reply to the answer of the defendant to plaintiff's second amended petition admits that he signed a certain paper writing subsequent to said alleged fire, to wit, on or about the 15th day of September, 1926, but denies that the same is in anywise a non-waiver agreement; that there was no consideration whatever for said agreement, and that the said non-waiver proposition, for whatever purposes it was signed, was immediately waived and avoided by the subsequent conduct of the Company as set forth in the second amended petition by requiring plaintiff to procure the written statements of the vendors of wool that furnished the proof or intended to prove the amount of wool in said building consumed, and as the same is more fully set forth in plaintiff's second amended petition herein filed, which is hereby adopted, as a complete waiver to this alleged condition subsequent claimed in said non-waiver agreement.

Reply.

For further reply, plaintiff denies that he utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy, and further alleges that plaintiff did give immediate notice of said alleged loss to the defendant company, which notice was then and there accepted by the defendant company, and acted upon by the defendant company, and it appeared and investigated the entire subject matter of the loss and made an estimate thereof in response to said notice of said destroyed property.

Plaintiff further denies that he utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy and set forth in defendant's answer.

Plaintiff denies that he utterly failed within sixty days after said fire, as required by the quoted conditions contained in said policy and set forth in said answer, and at all other times, to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured, and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the quoted conditions contained in said policy.

Plaintiff further denies that he utterly failed within sixty days after said fire and at all other times to make and render to said defendant due proofs of said loss, as required by the quoted conditions contained in said policy, but alleges that he complied with all of the requirements of said policy and that the said defendant company is estopped and barred from requiring any other or different proof or proofs either as to the value or quantity of property so destroyed by fire, for the reason that said defendant company required plaintiff to procure a list and quantity and the value thereof from all of said vendors of wool, with an agreement, that the said list would be fully satisfactory to the defendant and would be sufficient and would comply with the said terms of the policy, and the plaintiff, in compliance with the said request, prepared the statement made by the vendors for said defendant company, and has at all times held the same subject to their call and investigation as per agree-

ment with said defendant Company, as more fully set forth in plaintiff's second amended petition.

Plaintiff further denies that subsequent to said fire the plaintiff and the defendant ever disagreed as to the amount of loss caused by said fire to the property described in said policy or subsequently furnished to said defendant company, as aforesaid; admits that the amount of loss caused by said fire has never, at any time, been ascertained by appraisers, but that the said appraisement was waived and that further appraisement to ascertain the value was waived by requiring plaintiff to furnish an itemized list of the amount and value of wool contained in said barn by having the same verified and certified by the original vendors of said wool, as fully set forth in plaintiff's second amended petition therein.

Plaintiff admits that the quoted clause of the policy set forth in the defendant's third defense is subsequently correct, but denies that the interest of the plaintiff in said property, or any part described in said policy, was not truly stated by plaintiff to defendant.

Plaintiff further denies that the time of delivery or acceptance of said policy of insurance or any or all times thereafter, up until the time of said fire, the interest, if any, of the plaintiff in said property, or a part thereof, described in said policy, was other than unconditional and sole ownership; and denies that the same is not truly stated in said policy.

Plaintiff further alleges that the title or interest in any part described in said policy was encumbered by chattel mortgage and was fully known by the defendant company, and was ratified and accepted by said defendant Company and it collected premiums thereon and thereafter with full knowledge thereof, and that the same was fully known to the said defendant company at all times and was fully ratified by said defendant Company, as more fully set forth in said plaintiff's second amended petition.

Plaintiff for reply to the fourth defense admits that the quoted portion or extract alleged to be taken from the policy of insurance is substantially correct, but denies that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to the defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored. Plaintiff denies that he then and there well knew that said fire did not originate by lightning striking the building.

Reply.

Plaintiff for reply to the fourth defense denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to the defendant that no other person or persons had any interest in said wool, or any part thereof, contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; that plaintiff further denies that the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to, or an interest in said wool or a part thereof located in said building at the time of said fire.

Plaintiff further replying to the fourth defense, denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least seventy thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire. Plaintiff further denies that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00. And further denies that whereas, in truth and fact, as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed twelve thousand pounds, and further denies, and whereas, in trust and fact, as the plaintiff then well knew, the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of $4,000.00.

Plaintiff further denies that subsequent to said fire he further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging and in the possession of the plaintiff at the time of said fire, and further denies that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made.

Plaintiff further denies that he then well knew, many articles were mentioned in said sworn statement which were not in said building damaged and destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of

said fire. Plaintiff further denies that he well knew an attempt to deceive this defendant company as to the extent of said loss had been made and was then and thereby being made by the plaintiff, as alleged in said fourth defense of defendant's answer.

Plaintiff further denies that any false and fraudulent statements made by him to the defendant, as set forth in the fourth defense or in any of the other defenses with any purpose or intent on the part of the plaintiff to deceive or defraud the defendant, and further alleges that the defendant was neither deceived or defrauded in this behalf or in any other respect, as set forth in defendant's answer.

Wherefore plaintiff prays for judgment as in his second amended petition set forth.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.

[Duly verified.]

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

ORDER—Filed June 13, 1928.

This day these causes came on to be heard whereupon it is ordered by the court that said causes be, and the same hereby are, consolidated for the purpose of trial, to which order of consolidation the defendant excepted.

And thereupon to try the issues joined between the parties, a jury being called came, to wit: James Ballentine, J. A. Black, Pearl Durnelle, J. D. Dunnigan, Beriah Edwards, Samuel Eichenbaum, Clarence Ewing, R. P. Enderlin, Homer Feldner, George Hartman, Jerry Hammon, and Joseph Henderson, who were duly empaneled and sworn well and truly to try the issues joined between the parties in said causes, and at the hour of adjournment, the testimony not being concluded, the court respited the jury until nine-thirty o'clock tomorrow morning, to which time these causes are continued.

ENTRY—Filed June 14, 1928.

This day again came the parties, by their respective attorneys, also the jury heretofore empaneled and sworn herein, and having heard the testimony on behalf of plaintiff and defendant, thereupon defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled, to which ruling of the court the defendant excepted. Whereupon came the plaintiff and moved the court to instruct the jury to return a verdict in favor of the plaintiff, which motion was by the court sustained and the jury was instructed to return a verdict for the plaintiff for the sum of $5750.00 with interest from Sept. 6, 1926, to which ruling of the court the defendant excepted.

Whereupon came the jury and upon their oaths do find the issues joined in favor of the plaintiff and assess his damages at the sum of $5750.00 with interest from Sept. 6, 1926.

VERDICT—Filed June 14, 1928.

We, the Jury, herein do find the issues joined in favor of the plaintiff and assess his damages at fifty-seven hundred and fifty dollars, with interest from Sept. 6, 1928.

(Signed) R. P. Enderlin,
Foreman.

MOTION FOR NEW TRIAL.—Filed June 16, 1928.

Now comes the defendant, Sun Insurance Office, and moves the court to vacate and set aside the verdict of the jury heretofore rendered herein and to grant a new trial herein upon the following grounds, to wit:

1. The verdict of the jury is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.

2. The verdict of the jury is contrary to the evidence and the weight thereof.

3. The verdict of the jury is contrary to law and the evidence.

4. The verdict of the jury is contrary to law.

5. The findings and decision of the court, and each thereof, is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.

6. The findings and decision of the court, and each thereof, is contrary to the law and evidence.

7. The findings and decision of the court, and each thereof, is contrary to law.

8. The court erred in excluding certain evidence offered by the defendant, to which action by the court the defendant at the time excepted.

9. The court erred in admitting certain evidence offered by the plaintiff over the objection of the defendant, to which the defendant at the time excepted.

10. The court erred in not striking from the record or excluding from the consideration of the jury, on motion of the defendant, certain evidence offered on behalf of the plaintiff, to which ruling of the court the defendant at the time excepted.

11. The court erred in overruling the motion made by the defendant at the conclusion of the statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the statement of the case by plaintiff's counsel upon the ground that upon the statement of the case made by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

12. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel the plaintiff was not entitled to recover, to

Entry.

which action by the court the defendant at the time excepted.

13. The court erred in its general charge to the jury.

14. The court erred in overruling the motion made by the defendant at the conclusion of the plaintiff's case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

15. The court erred in overruling the motion made by the defendant at the conclusion of all of the evidence in the case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

16. There was error and abuse of discretion in the order of the court in consolidating this action with four other actions pending in this court, to which the defendant at the time objected and excepted.

17. The court erred in directing the jury to return a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

18. The court erred in not submitting to the jury the issue as to the amount of the loss.

19. The verdict of the jury is excessive.

20. There are other errors of law prejudicial to defendant appearing on the face of the record which occurred at and during the progress of the trial and to all of which errors this defendant at the time duly excepted.

Mooney, Bibbee and Edmonds,
Attorneys for Defendant.

ENTRY—Filed August 7, 1928.

This cause coming on for hearing, on the motion of the defendant to set aside the verdict, and for a new trial herein, the court, on consideration thereof, overrules the same.

Order.

It is therefore considered by the court that the said plaintiff, J. M. Scott, recover from the said defendant, Sun Insurance Office, the said sum of $6412.50 as heretofore, by the verdict of the jury, found due him, with interest computed to the date of this entry, together with his costs herein expended, taxed at $..... including a docket fee of $20.00 payable to the attorneys for the plaintiff, under provisions of Section R. S. U. S. 572, Title 28.

To all of which ruling, order and judgment the defendant excepts.

Benson W. Hough, Judge.

ORDER EXTENDING TIME FOR FILING DEFENDANT'S BILL OF EXCEPTIONS—Filed September 13, 1928.

Upon application of the defendants and each of them, and for good cause shown, the time for filing and having allowed and signed the bill of exceptions in the above entitled causes, and each of them, is hereby extended to October 1, 1928.

Hough, Judge.

BILL OF EXCEPTIONS NARRATIVE FORM—Filed September 22, 1928.

Wednesday Morning Session, June 13, 1928.

Present:

Messrs. James Joyce, F. S. Monnett and Elwood Murphy, on behalf of the plaintiff.

Messrs. R. M. Edmonds and G. E. Bibbee, on behalf of each defendant.

Be it remembered, That on the trial of the above entitled causes in the District Court of the United States for the Southern District of Ohio, Eastern Division, at the June, 1928 term thereof, before the Honorable Benson W. Hough, a Judge of said Court, and a jury duly empaneled and sworn, the following proceedings were had:

The Court, before the commencement of the trial of the above entitled causes stated and ordered in open court that the above entitled causes should be and were consolidated for the purposes of trial and tried in one trial.

Mr. Edmonds: If the Court please, at this point the defendant insurance companies, and each of them, The Sun Insurance Company in case 2563, The Home Insurance Company in case 2560, the Norwich Union Fire Insurance Society in case 2564, The Westchester Fire Insurance Company in case No. 2562 and the New York Underwriters Insurance Company in case 2561, and each of them object to the consolidation of these cases for a trial in a single trial, upon the ground that the issues and questions involved in the several cases are not identical but different.

Second, that in three of the cases, namely, the case against The Home Insurance Company, the case against The Norwich Union Fire Insurance Company, the case against the Sun Insurance Office, the question arises as to the effect of a loss payable clause attached to these policies which question is not involved in any way in the other cases. The defendants object to consolidation upon that ground.

The next ground of objection is that different agents issued the several policies and another agent the remaining two and that the questions involved are different in that respect.

The next ground of objection is that the question of parties arises in these cases which question will be common to some but not involved in others of the group.

For these reasons, each of the defendant insurance companies object to the consolidation of the cases.

The Court: Objection by counsel for the defendant

representing the five defendants may be entered on the record and the objections are overruled and exceptions of the several defendants noted, it appearing that these cases filed in the state Court were removed by the defendant insurance companies to this Court to apply to the jurisdiction of this Court for trial, and it further appearing that the plaintiff is identical in all five cases and that the subject matter of the suit depends upon a loss by fire which is common to all the cases.

If corporations insist upon invoking the jurisdiction of this Court it will be necessary for them to submit to the orders of this Court in questions of the procedure in trial. The cases will be consolidated and are consolidated and will be tried by one jury. Call the jury, Mr. Clerk.

To all of which rulings each defendant in the several above entitled cases at the time duly excepted for the several reasons stated in the objection to consolidation.

Thereupon statements of the case were made by counsel for the respective parties.

Wednesday Morning Session, June 13, 1928.

The Court: The plaintiff may state its case against the defendants to the jury.

Mr. Murphy: May it please the Court and Gentlemen of the Jury, there are five cases to be submitted to you in which J. M. Scott of Cumberland, Guernsey County, Ohio, is the plaintiff and the names of the defendant insurance companies have already been stated to you by the clerk when he swore you.

We expect the evidence to develop this state of affairs: J. M. Scott is a wool buyer, has been for years, is now, and lives in Cumberland, Ohio, and transacts his business there.

The Court: Just a minute; any separation of witnesses desired?

Mr. Murphy: Not on our part, Your Honor.

Mr. Edmonds: Yes, Your Honor.

The Court: All witnesses to be used in the trial of the cases on either side may retire from the Court Room until called as witnesses.

Mr. Edmonds: If your Honor please, the representatives of the insurance companies we may want to have in at times and may want to use as witnesses, if that is permissible.

The Court: Each of the defendant companies is entitled to one representative to represent it in Court. That is all right.

Mr. Murphy: In this town of Cumberland, on what is

known as Cumberland Street the plaintiff owned a barn, frame building, used for storing wool; adjacent thereto on the same lot, he lives in his six room house, owned by himself, occupied by himself, his wife and his daughter.

On the 6th day of September, 1926, the plaintiff had stored in this wool house about 82,000 pounds of unwashed wool, his own individual property.

The Court: 80,000 pounds, you say?

Mr. Murphy: 82,000 pounds and a little over. On the morning of the 6th of September, while this wool was in there, the wool house took fire and was totally destroyed, the building and all the contents, including this 82,000 pounds of wool. We believe the evidence will show that this wool was worth, at the time of its destruction at Cumberland, Ohio, from 40 to 42 cents per pound, in other words, approximately $33,000.00. This fire occurred about 3:30 or 4:00 o'clock in the morning at a time when there was a terrific electrical storm passing over there, thunder, lightning and rain. This building was owned by the plaintiff, worth about $3,000.00 and insured for $700.00 only. The property in which he lives, which is about 80 or 100 feet away, his dwelling is worth $5,000.00 and insured for $3,000.00. In it sleeping that night were his wife, an invalid, himself and his daughter. He was wakened up by the crash of fire. At the time of this fire each of these defendants had insurance policies on this wool ranging from $3,500.00 to $8,000.00 each. Some had existed for some time. The latest one was the 14th day of August preceding the fire.

Prior to the time of the fire the plaintiff had placed upon the wool 45000 pounds of it, a chattel mortgage in favor of The Cumberland Savings Bank of Cumberland, Ohio,—40,500 pounds of wool, that is it. At the time of the placing of the mortgage upon this wool, three of the defendants, the Home Insurance Company, The Sun Insurance Office and The Norwich Fire Insurance Company, were notified, as the agent of the company was also connected with the bank to which he gave the chattel mortgage and immediately attached to said policies the loss payable clause. On the 14th day of August he went to the agent of The New York Underwriters Insurance Company, as well as the agent of The Westchester Fire Insurance Company of New York and there obtained from that agent, whose name is Stottsberry, a renewal of his insurance policy of $3,500.00 with The New York Underwriters Insurance Company, who, as I say, was also the agent for The Westchester Fire Insurance Com-

pany and got that renewal at that time and at that time told Mr. Stottsberry, who is the agent who issued the policies and was at the time of which I speak, that there was a chattel mortgage on this property of 40,500 pounds of it, with The Cumberland Savings Bank of Cumberland, Ohio. No cancellation was made of the policies, no demurrer was entered by these two insurance companies of which I speak. It ran along until the fire. After the fire occurred, Mr. Scott immediately notified each of the defendant companies' agents that came there to represent them a week or so afterwards and Mr. Harrod, as an adjuster of the companies. The evidence will show that the adjuster and Mr. Scott met in The Cumberland Savings Bank rooms, and there a conversation was begun about the loss. Mr. Harrod said to Mr. Scott, "Now, you know, Mr. Scott, that there wasn't 78,000 pounds of wool in that building and it didn't burn and couldn't burn." Mr. Scott said to him "Mr. Harrod, it did burn and it was there." Mr. Harrod further said "Your building will not hold that amount of wool." Mr. Scott said "You don't know what you are talking about, for I loaded out of that building at one time 178,000 pounds of wool or thereabouts." Then Mr. Harrod said to Mr. Scott "Let us go to the building that was burned." So they went down there through two alleys, arrived at the building and it was viewed by both of them. Mr. Harrod said to Mr. Scott "Will you help me measure this building?" Then they took measurements, talked some more about the fire and then went up to the porch of this dwelling, on the same lot owned and occupied at that time by Mr. Scott. Mr. Harrod said to Mr. Scott "You will have to get a list of the names of the people from whom you bought this wool." Well, Mr. Scott said, "I will do the best I can. I am dealing with two or three hundred people and it may be difficult to get a full list but I will do the best I can." Mr. Harrod said "You will have to." He said "Mr. Harrod, that is pretty strong language. I again say to you I will do the best I can with the help of my boy. What more do you want me to do?" Mr. Harrod "You get the list, signed by the people from whom you bought this wool and if it amounts to 70,000 pounds you needn't do anything further." Now Mr. Harrod said "Mr. Scott, you will receive the regulation letter from these companies soon but pay no attention to that and I will come back and take up the matter with you, check over the names of the persons from whom you bought this wool and the amount and if it amounts to 70,000 pounds

or more we will settle, and there will be no further trouble."

Mr. Scott then, with the assistance of his son, and at the expense of about $200.00, besides the time, which took about thirty days or more, obtained the signatures of the persons from whom he bought this wool and the amount. I will say this wool was mostly bought in 1925. It was unwashed wool; it was what they call hold-over wool. It was bought at a higher value than wool was bringing in 1926. In 1926 he bought perhaps about 10,000 pounds of this wool, unwashed wool. After this Mr. Scott made up and sent to the different insurance companies his proof of claim within sixty days, to-wit, about the 4th day of the following month. That will be produced in evidence, to save time. He performed all the conditions of the policies, and each of them incumbent upon us to be performed. We were the sole owners, unconditionally, of this property at the time it was destroyed and at the time it was insured except the chattel mortgage of which I spoke, of which each of the defendants had full knowledge.

Aside from the wool in the barn which burned, were 144 wool bags of a value of $57.60. The total insurance on this property that was destroyed was $28,000.00 at the time of the fire and the value was far in excess of that. Each of these insurance companies had notice of the other insurance on the property at that time.

The evidence will show that there was some other wool in that building at the time it was burned insured by some of these same defendant insurance companies but it was separted from the wool owned by Mr. Scott. That insurance has been adjusted and paid. The insurance on the barn, I think, too, was paid.

The Court: Now, just a minute. Will you give the amount of insurance on all the various policies of the defendants and when it was taken? Start with the Home.

Mr. Murphy: The Home $8,000.00. The New York Underwriters—

The Court: What was the date when that insurance went into effect?

Mr. Murphy: I will get you that. I don't have it.

Mr. Monnett: It is in the petition.

The Court: You can get it a little later. The New York Underwriters, $3,500.00?

Mr. Murphy: Yes.

The Court: The Westchester?

Mr. Murphy: $5,000.00,

Bill of Exceptions.

The Court: The Sun Insurance Company?

Mr. Murphy: $5,750.00.

The Court: The Norwich?

Mr. Murphy: $5,750.00.

The Court: And the fire took place September 6th, 1926?

Mr. Murphy: Yes, at 3:30 or 4:00 o'clock in the morning.

The Court: The chattel mortgage was given when, sometime in June?

Mr. Murphy: Some time in June preceding.

The Court: June, 1926?

Mr. Murphy: Yes. Your Honor, I understand now that the Home Insurance policy was not renewed on August 14th, but it was a new policy. Mr. Stottsberry issued a new policy instead of a renewal on August 14th with The New York Underwriters.

The Court: You said Home. Is it the New York Underwriters or the Home?

Mr. Murphy: That is the New York Underwriters.

Mr. Monnett: August, 1926.

The Court: State the case of the defendants.

Mr. Edmonds: If Your Honor please, at this point, after the statement of the case by plaintiff's counsel the defendant insurance companies, The Home Insurance Company, the Norwich Union Fire Insurance Company, The New York Underwriters Insurance Company, The Sun Insurance Office, The Westchester Fire Insurance Company and each of them move the Court for a judgment in its favor respectively, upon the statement of the case made by plaintiff's counsel to the jury. The ground of this motion as to the Home Insurance Company, the Norwich Union Fire Insurance Society and the Sun Insurance Office is, first, that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss payable clauses making the loss payable to the Cumberland Savings Bank. That fact is also alleged and admitted in the pleading. Plaintiff's counsel has stated that the Cumberland Savings Bank at the time of this fire was interested in this wool by way of chattel mortgage and was a part owner thereof and with those facts the cases against these three companies are cases in which the cause of action, if any, under the policies, is a cause of action belonging to the plaintiff and the Cumberland Savings Bank jointly, whereas his petition alleges the plaintiff claims a cause of action lodged in himself exclusively.

Code, Section 11256, expressly provides that parties who are united in interests must be joined as plaintiffs or defendants. As the Supreme Court held in Upjohn vs. Ewing, 2 O. S. 14, joint creditors must be joined and all must recover or none can recover.

In Aetna Ins. Co. vs. Penn. 4 Nisi Prius, New Series, page 97, first syllabus (reading)

The Court: That would be a splendid way to dispose of the cases for the convenience of the Court and Jury but I don't think the Court could intelligently dispose of them along that line at this time.

Mr. Edmonds: May I proceed? I had one other ground.

The Court: Yes.

Mr. Edmonds: The motion on behalf of The Home Insurance Company, The Norwich Union Fire Insurance Company, the Sun Insurance Office as well as the separate motions of The New York Underwriters and The Westchester Fire Insurance Company are based also upon the further following ground, that from the statement of plaintiff's counsel it appears that at the time these policies were issued and at the time of this fire this wool, or part, was incumbered by chattel mortgage. The pleadings allege and admit that these insurance contracts all contained provisions which provide that

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." No facts are stated by plaintiff's counsel which void in law this admitted violation.

The Court: Motion overruled and defendants' exceptions, one and several, may be made a part of the record.

Mr. Murphy: Gentlemen, I forgot to say that this wool was destroyed in the same building in which it was insured. On the 24th day of November, 1926, the defendant companies, each of them, sent to the plaintiff a statement, following his proof of loss to them, in which he stated that his knowledge—to the best of his knowledge and belief the fire was caused by lightning. In this they return a copy of this, they did accept it, returning a copy of it and said that it was refused for the reason that the same does not state his knowledge and belief as to the time nor origin of the fire. The proof of loss, when submitted to you, will show that Mr. Scott said therein that to the best of his knowledge and belief the fire originated by lightning striking the building and the time was about

four o'clock A. M.; they stated in that that they disagreed as to the value of the loss or damages. The Home Insurance Company, likewise these others, "disagree with you as to the amount of loss or damage caused by fire." That is all they ever did, never asked for the appointment of arbitrators, never came any more, never sent anyone and that is the first and only knowledge that the plaintiff had that there was a disagreement; says they disagree, but they did not disagree. When Mr. Harrod was there there was absolutely no disagreement and no appraisal asked for because, at the time Mr. Harrod and Mr. Scott were at the ruins, Mr. Harrod said there is nothing here to appraise, it is a total loss. Remember my statement, this was unwashed wool, the fire occurred on Monday morning Labor Day, and it smoldered and burned until the following Friday before it entirely consumed the wool. Then he demanded that we get signatures of the parties from whom we bought this wool, because the other records were burned, and Mr. Scott did and he never came back to see it. It is now, and has at all times, and is now at their disposal for their inspection. Copies, I believe have been furnished and the original is here for their inspection showing the amount of over 82,000 pounds of wool.

Mr. Monnett: May I suggest, Your Honor, inasmuch as at the close of defendant's statement that they made on behalf of each and several of the defendants, that on the part of the plaintiff the jury be directed to return a verdict for the plaintiff in each case because they do not state, and do not plead, that they have tenedered back the premiums that they received for these respective policies and still hold them; it was held here in the Laughlin case that after they sued for a void contract and kept the proceeds of the note that they are bound to make the tender before they file such answer, and in his statement this morning he does not claim that he ever returned any of these premiums that were paid for these insurance policies, but, on the contrary, holds them.

Mr. Edmonds: If your Honor please, at the conclusion of the statement of the case by plaintiff's counsel and the reply statement of the case by Plaintiff's counsel, each of the defendant insurance companies moves the Court to arrest the case from the jury, render judgment for each separate defendant insurance company upon the statement of plaintiff's counsel for the reasons that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss pay-

J. M. Scott.

able clauses making the loss payable to the Cumberland Savings Bank. That fact is also alleged and admitted in the pleadings. Plaintiff's counsel has stated that the Cumberland Savings Bank at the time of this fire was interested in this wool by way of chattel mortgage and was a part owner thereof and with those facts the cases against these three companies are cases in which the cause of action, if any, under the policies, is a cause of action belonging to the plaintiff and the Cumberland Savings Bank jointly, whereas his petition alleges the plaintiff claims a cause of action lodged in himself exclusively; and for the further reason that in violation of the terms of each policy and without consent endorsed thereon the wool or a part thereof described in the several policies was encumbered by chattel mortgage at the time of the fire.

The Court: The motion is overruled and exceptions for each of the defendants is noted in the record.

Mr. Edmonds: May I add one other statement to the grounds, in addition to those stated in the first motion, and that is that plaintiff's statement of the case and the reply statement admits the disagreement between the plaintiff and the respective defendants as to the amount of this loss, and that the amount of the loss has not been ascertained by appraisal.

The Court: Again the motion and the remarks in connection therewith are overruled, and the exception of each defendant is noted in the record.

Be it remembered, that the plaintiff, to maintain the issues on his part to be maintained, offered and introduced in evidence the following testimony and evidence, to wit:

J. M. Scott,

called as a witness in his own behalf, being first duly sworn, testified as follows:

Examined by Mr. Monnett.

My name is J. M. Scott, James Madison, full name, generally write it J. M. I am slightly hard of hearing. Should you or the counsel at any time not make yourselves understood, I will indicate it. I reside at Cumberland, Ohio, and in September, 1926, at Cumberland, Ohio. In 1926 I owned the property we live in, and then I had my barn on the same lot, that is the property I had in the town. The size of the area of the lot including my wool warehouse or barn and my house is about 190 feet long; it is a little longer at one end than the other, one end about 190, the other end 170. The lot

tion of my warehouse or barn was on the northwest corner; my residence was on the southeast corner. Mrs. Scott, my daughter, Hazel, and myself occupied the residence on the date of the fire. The room where Mrs. Scott and I slept was on the west side of the house next to the barn. The barn was about 90 feet farther west and was of frame construction 33 by 40 feet. Two rooms were used for storage. There was a basement which was only used for trunkery and the like, never used for wool. The basement contained some refuse lumber and some good lumber which had been there some two or three years. The whole area of the first story of the barn is about ten feet high, with one partition, a box stall in the southwest corner about eight feet square. Nothing in that box stall at this time. In the remainder of the first story at this time there was stored wool belonging to me except about four thousand pounds stored there in 1925 in a little space next to the stairway to which I had no title. I had about forty thousand pounds of unwashed Delano wool in that first story, some of which had been there over a year, and some not there so long, some there possibly ten months, I bought some in November of 1925, that was all there and all my sack wool that was in there was carried over, stored in 144 sacks already packed up and ready to ship. The second story was the entire contour of the barn excepting the stairway where we went up, where we put just the loose wool, not sacked wool. "In the season of 1926, I was doing business for Johnny McCurdy Company, New York, I took and piled it up, riprapped it up in front, I threw the wool promiscuously back over that way one-half the building." No consignee wool in this story. This was all my unwashed Delano wool, from thirty-eight to forty thousand pounds.

Mr. Edmonds: Mr. Monett, if you will let us look at those policies, we probably can stipulate in the record those were the policies issued.

Mr. Monnett: Anything to shorten it, sir.

(Counsel for the plaintiff hands counsel for the defendants insurance policies.)

Mr. Edmonds: We are willing to stipulate that these exhibits are the policies sued upon.

Thereupon the insurance policies, produced by counsel for the plaintiff, were marked, for the purpose of identification, as "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4" and "Plaintiff's Exhibit No. 5."

J. M. Scott.

The Court: These are admitted on the stipulation that they are the policies on which these suits are based.

Thereupon the exhibits, heretofore marked for the purpose of identification as plaintiff's Exhibits 1 to 5 inclusive, were admitted in evidence on behalf of the plaintiff, marked "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4", and "Plaintiff's Exhibit No. 5", and are hereto attached and made a part hereof.

The Witness: The policy marked Exhibit No. 1, The Home Insurance Company, stipulates that in consideration of $101.60 premium paid by the insured, from the 6th day of July, 1926, to the 6th day of July, 1927, at noon against all direct loss or damage by fire, I paid that amount and got a receipt therefor.

Exhibit No. 2 is the New York Underwriters Insurance policy, which is for $3500.00, rate $1.27, stipulated premium of $44.45, for the term of one year from the 14th day of August, 1926, to the 14th day of August, 1927, at noon, against loss; I paid that $44.45. This was paid to Edward Stottsberry. The Home was paid to Mr. J. M. Bracken.

Q. Where did they live? A. Both live in Cumberland; they were the agents.

Mr. Edmonds: We object.

Mr. Monnett: You admit they were your agents.

Mr. Edmonds: We admit these were the local agents that solicited and countersigned these policies. The policies speak for themselves.

The Court: Go ahead.

Mr. Edmonds: I should say respectively signed the policies whose names they appear on.

The Court: The two individuals mentioned are respectively the agents of the two companies heretofore mentioned, The Home Insurance Company and the New York Underwriters Company.

Mr. Edmonds: Each individual being the agent for the respective company whose policy bears his countersignature.

The Witness: Plaintiff's Exhibit 3 is policy of Westchester Fire Insurance Company of New York, amount of insurance $5000.00, rate 1.48, in which the stipulated premium is $74.00, for insurance from the 1st day of April, 1926, at noon, to the first day of April, 1927, at noon; that premium of $74.00 was paid to I. E. Stottsberry.

Plaintiff's Exhibit 4 is policy of Sun Insurance Office.

J. M. Scott.

Established A. D. 1710, amount of insurance $5750.00, rate 1.27, premium $73.02, in consideration of the insurance to J. M. Scott, for the term of one year from the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that amount was paid to the company.

Plaintiff's Exhibit 5, Norwich Union Fire Insurance Society, Ltd., is defendant's policy, amount of policy $5750.00, rate 1.27, premium $73.02, in consideration of the stipulations therein named to insure J. M. Scott for the term of one year, beginning the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that was paid to Mr. Bracken, the agent.

Q. I will ask you whether any of those premiums have ever been tendered back to you either before or after this suit?

Mr. Edmunds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant, the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes I thought you had answered. A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted.

The Witness: The building described in each of these policies as a two-story, slate roof frame building, occupied as wool storage on the west side of Cambridge Street, risk #50, map 117½ Cumberland, Ohio, is the building I have just described to the jury, and these are the buildings that contained the wool I have insured. These policies all cover the same building, or the wool rather.

There is on Exhibit No. 1, attached on the face of said policy, the following: "Uniform Standard Ohio, Form No. 111, Loss Payable Clause. Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, O. Agency.

Dated June 6, 1926. J. M. Bracken, Agent." and was upon the policy at the date it purports to be.

There was attached to plaintiff's Exhibit No. 5 on or about June 24, 1926, "Uniform Standard Ohio, Form No. 111, Loss Payable Clause. Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, O., Agency. Dated June 24, 1926. J. M. Bracken, Agent."

On June 24, 1926, there was attached to policy Exhibit No. 4, "Uniform Standard Ohio, Loss Payable Clause, Form No. 111. Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 288271 of the Sun Insurance Office, Chicago, Ill. issued at its Cumberland, Ohio, Agency. Dated June 24, 1926, J. M. Bracken, Agent."

The nature of my indebtedness to the Clumberland Savings Bank Company was a chattel mortgage on forty some thousand pounds of wool at the price of that pile of wool to secure the money that I had borrowed out of the bank; only needed to borrow for my wool business.

Q. Can you state to the jury what was the amount obtained in money from the bank on which these are pledged in security to that amount? A. Well, I don't know whether I could or not until I look here, I would have to add them together.

Q. Take the three I have given you, can you take them?

Mr. Edmonds: We object, if your Honor please, the question of how much of the indebtedness was secured by this chattel mortgage is a simple question. I don't see what bearing that has on the policy.

The Court: Do you know how much money you borrowed on the chattel mortgage?

The Witness: I have in mind about $19,000.00.

The Court: That is near enough.

Q. Does that include these three?

Mr. Edmonds: We object.

A. That includes what I have in the C.. ..rland Savings Bank.

The Court: Objection overruled; exception.

J. M. Scott.

Q. Was Mr. Bracken connected in anywise with this Bank?

A. He was cashier of the bank at that time.

Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on the policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that, the evidence propesode to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an encumbrance by chattel mortgage, the entire policy shall be void; whereas, the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court. The defendant's exceptions may be noted.

(Question read)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I had borrowed from them. Now, let me just—

J. M. Scott.

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said "If you do, I will go to the office." He had company at home, his office was in the First National Bank of our town. I said, "No, it isn't necessary, you can write it out Monday morning and mail it, so I will get it through the mail; I am away from home during the week, and I will send you a check for the money," which he did.

Mr. Edmonds: Motion to rule out the answer and each part thereof, on the ground that it is a violation of the parol evidence rule.

The Court: You don't have to restate these reasons, we haven't time to listen to any dissertation upon it each time. Your motion to exclude the answer is overruled and your exceptions are noted, for the reasons announced in the objection to the question.

Q. I will ask you the same question, as to what, if anything, was said to I. E. Stottsberry, the agent's name appearing at the bottom of the policy, Exhibit No. 3, Westchester Fire Insurance Company, as to there being any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this question as the former, and the same reasons announced, and the court overrules the objection, and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy, which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Monnett, possibly the conversation took place on Saturday, and I expect that policy will be dated on Monday, I remember very well I went down to his home, it was on Saturday evening.

J. M. Scott.

Q. Had that lien existed on there up as early as the other Policy, April 1, 1926? A. No, sir.

Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court; Objection overruled; exceptions noted.

The Witness: He did not.

(Narrative continued) The fire occurred on September 6, 1926, about four o'clock A. M. The first I knew of it Mr. Yoho who lives below us hollered fire; I got out of bed and went downstairs. The fire was coming out of the second story, out of the south window; that window had poultry wire over it, we put it there years before, and when storing wool, it was there for ventilation; it looked like the flame was coming out about twenty feet long. Mr. Yoho at this time was out on our back porch. I couldn't tell who else was there. We went to notify the fire department; we have just a chemical fire engine. Every available effort was made to stop the fire. The fire entirely consumed both the wool and building. I have some samples in my grip, about all that was left of the wool.

Q. At the request of counsel, did you bring that with you, and if so, you may produce a sample of the residuum?

(Witness produces cinders wrapped in a paper and exhibits them to the court and jury.)

The Court: I understand he brought this?

Mr. Monnett: We asked him for any sample of ashes left.

The Court: You asked him, Mr. Monnett?

Mr. Monnett: Yes.

The Witness: I just did this up kind of hurriedly, there is about all that was left, that was the condition of the cinders that was left.

The Court: Put it on the floor.

Mr. Edmonds: If your Honor please, how could this get in the record?

The Court: I think we will put a string around it and mark it as an exhibit and give it to the reporter; I don't care what he does with it.

Mr. Monnett: I have presented here a package that my client brought at our request, the residue or residuum

of this fire, and ask the court to mark that Exhibit No. 6, and offer it in connection with this witness' testimony.

Thereupon the cinders, last above produced by the witness, were offered, introduced and admitted in evidence on behalf of the plaintiff, marked Plaintiff's Exhibit No. 6, and are attached hereto and made a part hereof.

(Narrative continued) These cinders were about two feet thick and covered about two-thirds area of the barn. It took from Monday until Friday to so extinguish it as to leave it in this condition. The first thing I did in the way of communicating with the company, or any of its agents, I notified the agents that day, the local agents, and Mr. Bracken, the agent of these three companies, was in Cincinnati at the time, but Mr. Stottsberry and Mr. Claypool was assistant manager in the bank, and he communicated with those three companies; I don't know that the agents ever made any examination. Mr. Stottsberry came the next day; I don't remember how long he stayed; he didn't make much of an examination; he was on the premises while they were still smoking and burning; he lives in the city. His agency is three or four hundred feet from this place. He stays in the bank. The bank wasn't so far, about two hundred yards. This was smoking and burning from Monday to Friday. To the best of my knowledge he remained in the city two hundred yards away all that time. When Mr. Bracken, the agent, was home, his home would be a little bit farther away, and he was in Cincinnati at the time, don't know when he returned, not for a week I think. I do not think he had anybody from his bank there. Mr. A. C. Harrod; came I think he arrived the 13th or 15th of the month; the fire was the 6th; six or seven days after that he arrived. The first time he was there, I didn't see him, but he left word at my home for me to write him at Columbus. I was out in the country buying wool for Mr. McMurdy, by the time I got home and before I had time to write him, I saw him. You might call that his second visit to Cumberland. I can not give the approximate date I was there and he was there. I think that was the 16th or 17th of the month, maybe the 18th, I can't say to that.

Q. State to the jury as fully as you can and the best you can, from the time he came and left, what was done between you and him? A. The first notice I had of him being there, he sent Mr. Stottsberry down, one of the agents, to me, and he said, Mr. Harrod, the adjuster, was up at the bank and wanted to see me. I went up

with Mr. Stottsberry, went back in the directors' room of the bank where they were sitting and was introduced to Mr. Harrod, and after possibly a remark or two was made, he produced this paper that they say I signed, which I did, that they call a waiver, asked me to read that over and sign it if I would. I read it over, and I thought, the most significant thing I seen in it was —

Mr. Edmonds: We object.

Q. State what conversation you had with him about it? A. I told him I didn't see anything wrong about signing that paper and signed it.

Q. What then took place? A. He asked me questions, about the fire.

Q. Can you give the jury the dialog about the fire as near as you can; what he asked you and what you replied? A. He asked me questions of the wool I had.

The Court: Now the plaintiff in this action has testified he signed a waiver or paper, which necessarily will have to be construed before we get through. At this point, why don't you produce that and get it in the evidence, so we will have it in an orderly way?

Mr. Monnett: We served notice on them to produce it.

Mr. Edmonds: You have a copy of it, haven't you?

Mr. Monnett: No, I thought we had it here.

Mr. Edmonds: You had a copy and retained it at the time it was signed.

The Court: Have you the original?

Mr. Edmonds: It was in triplicate, we have a copy, if they can't produce it.

Mr. Monnett: We served notice on them.

Mr. Edmonds: At your request, the defendant produces the non-waiver agreement.

The Court: No, at the order of the court.

Mr. Edmonds: Yes, the order of the court.

Mr. Monnett: This seems to be the original.

Thereupon the paper writing, last above referred to, was for the purpose of identification, marked plaintiff's Exhibit No. 7, and was offered in evidence by the plaintiff and was admitted by the Court.

Q. This purports to be on the 15th of September, 1926, J. M. Scott.

The Court: 15th of September.

Q. Yes; J. M. Scott, and then below that, Companies in interest, A. C. Harrod, Adjuster; now after—

The Court: Now, let's see, there is an assumption on the part of the adjuster to represent all five companies. Do you make any question about that?

J. M. Scott.

Mr. Edmonds: As to his authority to sign that; it is stipulated that he had authority to sign that agreement on behalf of each defendant insurance company.

The Court: Then over and above the five law suits filed in this court, in each there is a common plaintiff and in each the subject matter of the contest is over the loss by fire on September 6th, of the wool and the building. I say, over and above that, we find that all companies are represented by one common individual, common adjuster. That might be announced as a further reason on the part of the court in consolidating and trying these cases together.

Q. Subsequent to this waiver, what was done in the way of Mr. Harrod requesting you—

Mr. Edmonds: Subsequent to this waiver; it is a non-waiver agreement, you call it a waiver.

Mr. Monnett: Exhibit 7. The court has held you can waive a waiver, as well as an original contract.

Mr. Edmonds: My objection is that you are not designating it correctly.

Q. I will call it No. 7; what, if anything, was done between you and Mr. Harrod, representing these five companies, subsequent to this to determine the value of the loss of this property; state what took place in your own way A. Well, he asked me questions as to the amount of wool I had and jotted them down.

Q. The amount of the wool in your policies? A. No, the amount of wool I had consumed in the fire.

Q. Insured in the policies? A. Yes.

Q. He asked you the amount of wool as to what, now what about it?

The Court: That is a wrong conclusion. The question here is whether the wool that was burned was insured or was not. The other side claims apparently it was not insured. Under the various conditions of the policies, there was no liability, if there was no liability, no insurance on it.

Mr. Monnett: On the other hand, if they take the position of no insurance, they can't be heard to object if we made no proof then.

The Court: Object to what?

Mr. Monnett: They can't object to proof if we made none, if we made no proof.

The Court: The form of the question was the objection.

Q. State what was said by this adjuster, between you

further, as to the fire, give it in order the best you can from start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and fixing the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: In so far as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted.

(Narrative continued) My conversation with Mr. Harrod began after I signed that waiver, number 7; he asked me about the amount of wool and if I was the sole owner of it and all those questions. I answered "I am not certain about the amount of wool I had, Mr. Harrod." I said "My books were all burned, I kept my books in the barn and in the wool storage room", "my accounts were all burned. I am only giving from memory, but I had from seventy to eighty thousand pounds, I couldn't tell you, but I am satisfied I had seventy thousand, I believe I had eighty." He put this down. After he talked and asked these questions, he dismissed the two local agents and they went out of the room. They had not any more than gotten out of the room, when he took a lead pencil out of his pocket, looked at me and said, "Scott, you know you didn't have eighty thousand pounds of wool in that barn, it wouldn't have burned, another thing, that barn wouldn't have held it." My answer was "Mr. Harrod, I didn't say I had eighty thousand pounds of wool in that barn, I said I believed I had, I said to you I knew I had upwards of seventy thousand pounds of wool in that barn, and I had a standing offer from Mr. McMurdy

for forty-five cents a pound," I know it burned." His answer was "I would like to make measurements of the barn, will you help me?" and I said "sure", and went down with him. He proceeded first to measure the foundation by pillars of the entire countour of the barn, the contour of the barn was still traceable. He produced a tape line; I carried the tape line. I don't know what measurements he took, I carried the tape line for him, I put it where he ordered me to take it. I couldn't say if he made substantially correct measurements, so far as running the tape. After that he asked me to show him where the wool was located in the barn by pillars still located there, which I did. The pillars were posts mostly set in cement foundation. I am speaking of the stone and brick, the posts were consumed. He wanted me to explain where the two different bunches of wool, the sack wool and the wool upstairs in the second story, were located, and the wool in that first story, which I proceeded to do, taking the foundation as a guide. I proceeded to sow first where the one hundred and forty-four sacks of wool were, designating this box stall in the corner which had no wool in it. Then, I proceeded to give him the dimensions of the upstairs. I have loaded one hundred and eighty-five thousand pounds of wool out of that barn at one time, I explained that to him up in the bank. After we got through the measurements I said "Mr. Harrod, I want to call your attention right down there", showing him where I took the wool on the Saturday before the fire for Mr. McCurdy; I says he has written me repeatedly there would be some salvage possibly damaged by ——. I was buying wool for Mr. McMurdy in that season. I was putting it there. The wool was all taken out of there on the 28th of August and on the 4th of September I began putting in wool for Mr. McMurdy, that is the Saturday before the fire I mean all the McMurdy wool was taken out of the barn; then on the 4th of September I began taking in wool in the afternoon for Mr. McMurdy again. I had no help and I piled it on the first floor, and I intended to put it upstairs, always put loose wool up in the second story. I told Mr. Harrod that Mr. McMurdy had "repeatedly written me and I have repeatedly written him there was no salvage left, it was an entire loss." Mr. Harrod said "Yes, whatever is there is an entire loss." He did not go around and examine these cinders. It was in view. I believe he did take a stick and stir them. He had me walking around and he remarked "Pre-

bad to have you walk around through there." It was all visible to him. There was no salvage at that time and no wool left that was not consumed.

Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that the parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can save your exceptions.

Q. What requirement did he then make of you? A. He asked me, he said, "Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them." I says, "I will do the best I can," I says, "I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment." I had bought before this and shipped several carloads the same season. He said, "You can remember." I says, "It is a pretty big thing," I says—I told him I would do the best I could.

Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the best I could, and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

Q. You may state to the jury— A. I haven't told you all.

Q. Go ahead? A. Then he says, "Well, Scott, I wouldn't know any way to say but the one, you have to." He says, "It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss."

J. M. Scott. —

"Well," I says, "I recognize that fact, but", I says, "Wouldn't my oath amount to something in it?" He said the oath wouldn't do. I says, "I will still say what I said prior to this, I will do the best I can." I says, "I don't know how soon I can do it; we will go right at it. I will go and see my son and go at it." I says, "The roads are in such a condition, we can't travel by automobile."

Q. Unimproved roads? A. Yes, unimproved roads. He says, "That is about all that can be done until you get that proof of loss, and I will come back and check up with you sometime." I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, "Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me?" and he says, "No." He says, "You get that gathered up; Scott, and there will be no trouble; we will have a settlement." He says, "In the meantime you will get a form like that we usually send out, but you pay no attention to that, you go right ahead and gather up this wool." I says, "I will do it."

Motion by counsel for defendants to strike out each and every part of the answer on the same grounds.

The Court: Same ruling and same exception.

Mr. Monnett: I ask the stenographer to mark these papers in their order.

Thereupon paper writings, produced by counsel for the plaintiff, were, for the purposes of identification, marked "Plaintiff's Exhibit 8", "Plaintiff's Exhibit 9", "Plaintiff's Exhibit 10", "Plaintiff's Exhibit 11", "Plaintiff's Exhibit 12", and "Plaintiff's Exhibit 13."

Mr. Monnett: I have here some manuscripts, beginning with Plaintiff's Exhibit 8 to Plaintiff's Exhibit 13, inclusive, which says, "Cumberland, Ohio, November 30, 1926. We, the undersigned, residents—

Mr. Edmonds: We object to counsel reading it; may we look at the document?

Mr. Monnett: Yes (handing same to counsel). They went out in compliance with their request and got the amount of wool from each of the purchasers.

The Witness: Everyone, the farmer's own signature, his own handwriting.

The Court: What is the objection to this?

Mr. Edmonds: We haven't seen them, your Honor, I would like to look at them.

J. M. Scott.

The Court: While you are looking those over and deciding, we will take a recess for the noon hour.

Thereupon a recess was taken until 2:00 o'clock P. M. the same day.

Wednesday Afternoon Session, June 13, 1928.

And also

J. M. Scott,

resuming the stand, testified as follows:

Examined by Mr. Monnett:

Q. I now hand you these Exhibits and will ask you to look at them and state what you have had to do with them and what they are. A. This is the poundage of wool that we gathered up from different men.

Q. Does that represent the vendors or salesmen that sold the wool to you that was in this warehouse? A. Yes.

Q. Are those the names and the amounts and the dates that are attached on there? Do they represent the time that the particular men signed? Is that what Adjuster Harrod requested you to furnish?

Question objected to by the defendants as leading.

The Court: That is objectionable; he has already testified to that.

Q. Look them over; take No. 8 and state what ones of them personally obtained and what ones your son obtained, if you can. A. I obtained all on No. 8. Those are all those men's signatures.

Mr. Monnett: I will not take time to read them now.

The Court: They are not in evidence.

Q. What is the next one? A. It is No. 9. My son, I think, procured all of these.

Mr. Bibbee: What do you mean by all of these?

The Witness: I mean on this sheet.

Q. All the names on No. 9, you think, were your son's? A. Yes.

Mr. Monnett: I will mark that S.

Q. Take No. 10? A. No. 10, my son procured those.

The Court: I think you are wasting time.

Mr. Monnett: I would like to make the proof of these two, because under our rulings, if they required and they anticipated they did, they waived their rights.

The Court: The question would be on the competency of those to go in evidence.

Q. State to the jury after you examine them whether you can state that was the amount of wool that was sold to you and delivered to you and that was in the warehouse? A. This is part of it.

J. M. Scott.

Q. To that extent, it was in there? A. To that extent it is that much.

Mr. Monnett: We offer that in evidence.

Mr. Edmonds: We object on the following grounds: it is an attempt to show a waiver here by something other than an endorsement on the policy. Second, in view of the non-waiver agreement such evidence of waiver as here offered is incompetent. This is simply hearsay statements of the persons whose names here appear. The parties are not here for cross examination.

The Court: Exhibits 8 to 13 would not be competent to show what you are attempting to show. The witness is on the stand testifying. He may refer to this memorandum and state of whom he bought wool and when he bought it and the aggregate amount of wool he bought.

Q. After you examine that will you state to the court and jury of whom it was you bought and the quantity and about the time that it went into this warehouse? A. C. E. Knowles, 1395 pounds, July 11th, 1926. J. A. Young, 3170 pounds, Auguth 28th, 1925.

Mr. Edmonds: We object, it does not appear that this document refreshes his recollection.

The Court: Objection overruled and your exception may be noted.

The Witness: J. A. Young, 3170 pounds, August 28th, 1925.

Q. Does that refresh your recollection? A. Yes. W. B. Spooner, 790 pounds, July 14th, 1925. J. D. Collins & Sons, 1787 pounds, August 13th, 1925. John Lestock, 519 pounds, July 11th, 1925. C. E. Bundy, 452 pounds, July 11th, 1925. Herbert LePage, 398 pounds, July 7th, 1925. Garvin Brothers, 468 pounds, July 18th, 1925. S. Brant Bliss, 1200 pounds, plus, July 24th, 1925. J. W. Cellers, 410 pounds, 1925. W. G. Pryn, 240 pounds.

Q. Do you know these men personally as being the men from whom you bought this wool? A. I do; I know all those men personally.

Q. Take up any one of these others and state whether you got them or not, and state, after examining them, which ones you got? A. Some might be a little hard for me to read.

Q. Look them over, be careful about them and if there are any of those that you know personally about, state them and the amount of wool? A. J. B. Allison, 180 pounds. I had forgotten the date but that was 192[illegible]. That was wool that I bought with my personal check.

J. M. Scott.

Mr. Edmonds: The defendants object; the witness is now obviously just reading the list, reading a list that he did not get.

The Witness: I secured this one.

The Court: He is testifying to a fact that he bought wool of these various parties and the quantities of wool. I do not know what may develop on cross examination.

The Witness: H. E. Kreight, 286 pounds, July 23, 1926. E. E. Buckey, 360 pounds, July 23, 1926. I procured all of those.

Q. Were those delivered to your warehouse? A. Yes, those were all bought in 1926.

Q. I call your attention to Exhibit No. 10, keeping them in order; examine that and state whether that refreshes your memory as to whether you bought of those people and that amount of wool was delivered to your warehouse? A. My son got this one but I know these men and I know about the wool.

Q. Give the amounts as near as you can? A. A. F. Crawford, 410 pounds, July 10th, 1925. E. L. Watson, 1250 pounds, August 10th, 1925. W. E. Davidson 330 pounds, July 10th, 1925. E. L. Stewart, 660 pounds, August 8th, 1925. J. D. Nelson, 800 pounds, July 10th, 1925. E. R. Sims, 300 pounds, July 18th, 1925. W. C. Aikin, 703 pounds, July 10th, 1925. C. H. Ziler, 938 pounds plus on and after August 8th, 1925. D. S. McNutt, 954 pounds, July 11th, 1925. M. D. Wheeler, 105 pounds, July 11th, 1925. H. S. Johnson, 730 pounds, plus. He has that on after July 11th. J. C. Paisley, 450 pounds, July 18th, 1925. J. D. Paisley, 306 pounds, July 18th, 1925. Lewis McIntre, 600 pounds, July 18th, 1925. C. C. Johnson, 2250 pounds, July 18th, 1925. There is a name I can't get and it looks like "Flowers," 700 pounds, July 9th, 1925. J. C. Starrett, 525 pounds, July 11th, 1925. S. J. Alexander, 735 pounds plus, July 11th, 1925. I know all these men except that name there, I can't make out.

Q. Was this wool delivered to your warehouse? A. Yes.

Q. I call your attention to Exhibit No. 11 and will ask you to examine the names and amounts and refresh your memory and state to the jury, if you will, whether that was received in your warehouse and the quantities? A. This I got part and my son part.

Q. Do you know, after looking at that, that is the amount of wool that you received? A. Yes.

Mr. Edmonds: We object to the form of the question.

J. M. Scott.

The Witness: James R. Spratt, 720 pounds, Augu 18th, 1925. S. R. Gregory, 240 pounds, August 28t 1925. C. J. VanReen, 240 pounds, July 11th, 1925. W H. Pollock, 1310 pounds, July 11th, 1925. I. B. Wilso 650 pounds, July 11th, 1925. There is a name I can get, 966 pounds, August 2[illegible]th, 1925. R. E. Watson, 11 pounds, July 16th, 1925. W. W. Harris, 340 pound August 15th, 1925. E. E. Galloger, 1655 pounds, Angu 28th, 1925. S. J. Shepler, 900 pounds, July 11th, 192 Carlos Cooper, 655 pounds, July 20th, 1925. W. C. Gla 408 pounds, July 18th, 1925. W. S. McCracken, 5 pounds, July 20th, 1925. Wm H. Huffman, 2312 pound August 22nd, 1[illegible]. E. V. Few, 248 pounds, July 18t 1925. That name, I want to state to the jury, I wro myself with his anthority. That is the only one I wro C. L. Reed, 680 pounds, July 18th, 1925. P. L. Warne 387 pounds, July 11th, 1925. R. F. Clapper, 7[illegible] pound July 11th, 1925. John Harkness, 750 pounds, July 14t 1925. George Echelberry, 376 pounds, July 11th, 192 W. A. Johnston, 987 pounds, July 18th, 1925. G. W Hupp, I don't get these figures, they look like 4 pounds, July 29th. J. W. Long, 615, August, 192 There is no date only August.

Q. Did they deliver that quantity of wool? A. Ye and that is all their own signature, as far as I know on there.

Q. And is that part of the wool that was burned? A Yes.

Mr. Edmonds: We move that the Court rule out t statement that is all in their handwriting.

The Court: That may remain in.

Mr Edmonds: Exception by each of the defendant

The Witness: Elwood Laughlin, 1196 pounds, Jul 19th, 1926. John McCormac, 2081 pounds, July 12t 1926.

(Narrative continued) Yes, I know those men. an that wool was delivered to me and the amounts. I wou like to make some explanation why I have some wool 1926 in there, and that is this, John E. McMurdy, I be for a manufacturer by the name of John McMurdy New York. I have a signed contract when I buy wo for him I can't buy for anyone else, but when I w not buying for him I had the privilage of buying f myself. That is why I got this wool in 1926. Sometim he would stop me from loading up with more wool. had a little over 62,000 pounds. I was paying 40 cen a pound at the time of the fire. The wool I had in

warehouse at the time of the fire was worth 42 cents a pound, a little over $32,000.00. I am not positive just what wool bags are worth at the present time. At the time of the fire I think they were worth about 60 cents to a dollar apiece. There were 144.

Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the grounds heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exception noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said a while ago, through mud roads where he could not go by automobile.

The Court: Of course all we care for here is that they went around to the various farmers to find out how much wool they had purchased and of whom they had purchased it.

Mr. Monnett: There is another phase as to a certain line of authorities that if they had to spend time and money at their request that they are recognizing the existence of the policy and that is a question of estoppel if they ask them to do a certain thing.

The Court: You are not trying to recover for the expense?

Mr. Monnett: It is just a question of estoppel. It is in the record that this was done at the instance of the adjuster in order to determine how much wool was in that building which burned.

Q. How many days did that take, about? A. It took my son something like forty days; I did not spend that much time. I went by train and went out to the country and came back on the train. Mrs. Scott was in such a condition I did not want to stay away over night.

Q. I will ask if, in addition to this, you furnished in writing and under oath for each company, about October [illegible] notice of your loss? A. I did.

Mr. Monnett: Have you those originals that we served notice for you to produce?

Mr. Edmonds: He did not serve notice designating anything of that kind.

Mr. Monnett: We gave a very broad notice.

J. M. Scott.

The Court: Have you carbon copies of the letters that were sent?

Mr. Monnett: Yes, we have.

Q. I will ask you if you had prepared and sent on or about the 4th day of October, proofs of the notice of the loss by fire to these respective companies?

Mr. Edmonds: We object; the papers will speak for themselves.

The Court: Answer that by yes or no.

Mr. Edmonds: Exception.

The Court: The question is, did you on or about the 4th day of October send to the various companies who are defendants here proof of loss.

The Witness: Yes.

Q. Are these carbon copies of the same you swore to? A. I couldn't say as to the carbon copy part. They are copies of what I swore to.

Mr. Edmonds: These papers presented have a lot of other matter on them.

The Court: The memoranda does not have anything to do with the exhibit.

Mr. Edmonds: If your Honor please, we have and will produce the originals if you wish.

The Court: They asked you that awhile ago but you said it was not included in the notice.

Mr. Edmonds: It was not, but I offer to produce it anyway.

The Court: Let us have the originals.

Mr. Edmonds: Here they are, each one to a different company.

The Court: The one addressed to the Home Insurance Company may be marked Exhibit 14; the one addressed to the New York Underwriters Company Exhibit 15; the one addressed to the Westchester Fire Insurance Company Exhibit 16 and the one to the Sun Insurance Office or Company as Exhibit No. 17 and the other to the Norwich Insurance Company as No. 18. Those are proofs of claim, are they?

Mr. Monnett: Yes.

The Court: All dated October 4th.

Mr. Monnett: I think so, yes, received on October 18th, according to their stamp, 1926, Wm. N. Banes, General Adjuster. I do not think the record shows that we had formally offered the five policies, although they were admitted in the pleadings.

The Court: Yes, they have been offered and the Exhibits have been offered and admitted except 8 to

were excluded. 14 to 18 are the present items of business. Are you offering those?

Mr. Monnett: Yes.

The Court: They may be admitted.

Mr. Edmonds: Each of the defendants object to the introduction of Exhibits 14 to 18 inclusive upon the ground that the papers do not show compliance with the requirements of the policy.

The Court: The papers show what they show and they are useful in evidence up to the limit of what they show. If they are defective, that is another proposition. Your objection is overruled and exception noted.

Mr. Edmonds: Exception by each of the defendants.

And thereupon the proofs of loss sent to respective insurance companies were admitted in evidence on behalf of the plaintiff and are herewith submitted marked Plaintiff's Exhibits 14 to 18 inclusive and made a part hereof.

Q. The foundation structure, just describe the walls and what was the condition of those walls after the fire.

The Court: The foundation did not burn out?

Mr. Monnett: He says the way they were built there was a bigger draft because of being open on three sides.

The Court: It does not make any difference how much draft there was if it burned the building down.

Mr. Edmonds: The non-waiver agreement, is that in evidence?

The Court: The non-waiver agreement is in evidence.

Cross Examination.

By Mr. Edmonds:

Q. Mr. Scott, you have spoken, on your direct examination of a chattel mortgage which you executed to the Cumberland Savings Bank Company of Cumberland, Ohio. I hand you a paper which the stenographer may mark for identification as Defendant's Exhibit A, and will ask you to state whether that is the original chattel mortgage which you executed to the Cumberland Savings Bank?

A. Well, I would say it was because it is my hand write.

Q. That is your signature at the bottom? A. Yes.

Q. And your wife's signature? A. Yes.

Q. That is the original chattel mortgage to which you referred?

Mr. Monnett: We object to calling it the original chattel mortgage because it is not verified by the guaranty and under the statute it is void except between parties

and, so far as they are concerned, it is no mortgage at all. This has never been verified by the bank so they could not be held to complain.

The Court: I do not think we can regulate these claims. There is not anything before the court.

Mr. Monnett: The point I make is, if they are objecting that the real parties in interest should sue, they would not sue because they had no chattel mortgage to sue on.

The Court: We will pass that point.

Mr. Monnett: I want to save the record.

The Court: It has not been offered in evidence.

Mr. Monnett: It is a void chattel mortgage so far as the bank is concerned as against this insurance company. They would have to pay it to us in any event.

Mr. Edmonds: We offer defendant's Exhibit A as a part of the cross examination of the witness.

Same objected to by the plaintiff.

The Court: It may not go in evidence.

Mr. Edmonds: On the ground of the order?

The Court: Yes. It is part of your own case.

Q. How much, at the time of this fire, was due from you to the Cumberland Savings Bank Company, Mr. Scott, on the indebtedness secured by this chattel mortgage? A. I said I thought about $19,000.00. I don't know exactly, maybe not quite that much, but in that neighborhood.

Mr. Edmonds: Will you produce the letter requested in our demand and subpoena duces tecum rejecting the proofs of loss in these companies?

(Here same is produced.)

Q. I hand you, Mr. Scott, Defendant's Exhibits B to F inclusive, which have been produced by your attorneys, and ask you to state whether, after you had submitted the sworn statements which you have identified as Exhibits 14 to 18 inclusive, whether, after you had submitted those statements to the insurance company you received these exhibits, B to F inclusive, from the several defendant companies in these cases.

Mr. Monnett: We object because they waived that by recognizing the existence of the policy and requiring this seperate proof of loss as indicated in the testimony.

The Court: That objection will be overruled.

Mr. Monnett: Exception.

Q. The question is, whether you received these from the various companies? A. Yes, I received them.

J. M. Scott.

Q. And you received them about the dates that they bear, November 24th, 1926? A. I couldn't say as to that. I suppose I did. I couldn't say as to that.

Q. I call your attention to the registered date stamped on the backs of the envelopes attached to these Exhibits, the date of November 24th, 1926, and will ask you if that date stamp refreshes your recollection, approximately, as to when you received these letters? A. No, it does not refresh it, but I believe I received them according to that stamp.

Mr. Monnett: Same objection.

Mr. Edmonds: Defendants offer in evidence Exhibits B to F inclusive as a part of the cross examination of this witness.

Mr. Monnett: We object.

The Court: Objection sustained.

Mr. Edmonds: Again on the ground of the order?

The Court: Of the order. Those exhibits, however, I might say, should have been presented to the other side and gone in as part of the record in chief so that the whole of the case would be before the Court before the close of the testimony.

Mr. Edmonds: Our theory was, inasmuch as they had raised on direct examination the matters as to which these documents were pertinent it was proper for us to go into them on cross examination and therefore I offered them as part of the cross examination.

Mr. Murphy: The reason we did not, we did not know whether or not they were sufficiently identified and we have other evidence to identify them and that we were going to offer them in evidence.

The Court: It appears they have been sufficiently identified.

Mr. Murphy: They may be offered in evidence, then.

The Court: As part of the plaintiff's case?

Mr. Murphy: Yes.

Mr. Edmonds: That is, I understand, Mr. Murphy, then the record shows that the plaintiff offers in evidence Exhibit B—

The Court: No, the record shows that the plaintiff offers in evidence as a part of the examination of the plaintiff himself Exhibits 19, 20, 21, 22 and 23. 19 refers to the reply from the Home Insurance Company; 20 will be the New York Underwriters; 21 the Westchester Insurance Company; 22 the Sun Insurance reply and 23 the Norwich Union Fire Insurance reply.

And thereupon the papers above identified were ad-

mitted in evidence on behalf of the plaintiff and are herewith submitted marked Plaintiff's Exhibits 19, 20, 21, 22 and 23 and made a part hereof.

Mr. Edmonds: And this chattel mortgage, do I understand that they are also offering that?

Mr. Monnett: No, sir.

(Narrative continued) On January 1st, 1926, I had in this barn about seventy-two or seventy-five thousand pounds of wool. I kept all of that. The wool that I bought in 1925 I paid forty-five to fifty-three cents. The price of wool on the market at the time of the fire was forty-one to forty-two cents.

Q. So that if you had sold the wool which you had accumulated in the year 1925 at the market price of 1926 you would have stood to suffer quite a substantial loss, wouldn't you?

Mr. Monnett: You would have to determine the value, just what the value was, whether you lost or made.

The Court: I think that is so. If the price had gone up you would have made money and if it went down you would have lost money. That has not anything to do with the issue here that I can see. Objection sustained.

Q. How much wool did you purchase during the year 1926, up to September 6th, when this fire occurred, of your own? A. Six to eight thousand pounds—nine or ten—from six to ten thousand pounds.

Q. But you would not tell the jury any more definitely than that? A. I read off those names.

Q. I am not asking you that now. A. From six to ten thousand pounds.

Q. You cannot be any more definite?

Mr. Murphy: He has given it exactly.

The Court: He has reiterated it twice from six to ten. He said he had about eighty-two thousand pounds in at the time of the fire and he had from seventy to seventy-two thousand the first of January and he added enough to it to make the total of the eighty-two thousand, which he says was from six to ten thousand of his own.

(Narrative continued) I was not buying wool for the John McMurdy Company of New York in 1925. I began buying wool for them, I expect, about the first of June, 1926. I would say that in 1926 I purchased on behalf of the John McMurdy Company three hundred thousand pounds of wool. I did not put all of that in this barn when I purchased it. I put part of it in there. I did

business through this barn for John McMundy Company in 1926. I had my own wool and I had McMurdy's wool in there in 1926. The tablet that I used for a record of the purchases made for John E. McMurdy was kept in the barn. But when I was buying for anyone else I always used a kind of a double precaution and I kept the record that had the names on, every man's name that I purchased from and the amount of pounds, I kept that in a bookcase at home. The tablet part of the record of the transactions for John E. McMurdy I kept in the barn. I counted up on the tablet and every Saturday I transferred that to a book. I kept that book in my house. I only used tablets for the records of my own purchases on my own account. I kept that in this barn and that was burned up in the fire. After the fire I didn't have anything to show for the receipts of the men who had the wool stored there. I had wool stored in there for other people, amounting to four thousand pounds, outside of McMurdy's wool. I just finished taking in seven hundred and some odd pounds of wool for McMurdy. That is all the McMurdy wool I had there, I took that in on Saturday afternoon. When I purchased this wool in 1925 I kept a separate bank account of my own purchases in the Government Savings Bank. The wool that I bought in 1925 I paid for most of it by check. If a man wants it for cash I give it to him. I am not able to produce the cancelled checks for those payments for the 1925 purchases, as they were burned in the fire. I also kept my bank checks in the barn; all my business was kept in there and I had my office in there in the northeast corner; took up about six foot square space. A box stall was in the opposite corner. There was about forty-one thousand pounds of wool on the first floor. About two-thirds of the floor space on the first floor was covered with wool, and went about ten feet high. The wool on the second floor went about nine feet high and covered very nearly a half of the floor space, not quite the half. Yes, it went up to the level where the roof began, went way above that, just about six feet up to where the level was and I said eight to nine feet. I know it was higher than I could reach up.

I talked to Mr. Harrod twice. It is true I said this morning that some one told me that he had been there, but I did not see him the first time. I saw him twice. I saw him when he came back to make the settlements

J. M. Bracken.

with these men that had this wool stored there, the ... ond time I saw him.

It would be pretty hard to tell the average weight ... each fleece of wool, one bag. I would say about ei... pounds to the fleece. The average weight of the w... in the bags, per bag, all depends on the season of ... year they bag it. When wool is bagged in the su... mer time, it is one thing. In the winter the greas... kind of frozen and it don't pack so tight. We h... had many a car of wool that is over two hundred ... eighty pounds, per bag. I loaded one hundred car lo... this year and they averaged over two hundred ... eighty pounds.

Re-Direct Examination.

By Mr. Monnett:

After I had prepared this statement for Mr. Harro... he never called for it.

Q. I think they have put in this letter about the no... waiver agreement, so-called. Did the company ev... name any arbitrator?

Mr. Edmonds: The defendants and each of them ob... ject to that question as wholly immaterial.

Mr. Monnett: They must do something more than ... state that they are going to have an arbitrator.

The Court: May it be conceded here, then, that neith... party has taken any action toward an arbitrator?

Mr. Monnett: Yes, they have tendered nobody, sen... no name, and went no further.

The Court: Do you agree to that?

Mr. Edmonds: That is the fact, but we maintain it ... is an immaterial fact insofar as our not demanding ... appraisal is concerned.

The Court: You claim it was up to the other side ... start the proceeding and get it in motion?

Mr. Edmonds: Yes. The Supreme Court has so he... and I would be glad to submit the authorities on it.

Mr. Edmonds: That was after we had complied wi... their request and during the time that we were compl... ing with their request.

And also:

J. M. Bracken

called on behalf of the plaintiff, being first duly swo... testified as follows:

Examined by Mr. Murphy:

My name is J. M. Bracken; I live in Cumberland, O... I am from Cumberland, Guernsey County, Ohio. I ... acquainted with J. M. Scott and knew him during ...

year 1926. At that time I was cashier of the Cumberland Savings Bank. At the same time I was fire insurance agent. Those are my signatures at the bottom of Exhibits 1, 4 and 5. I issued those to Mr. Scott.

Q. Do you recall of Mr. Scott giving a chattel mortgage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage?

Mr. Edmonds: He asks, do you recall of Mr. Scott giving a chattel mortgage and we object; first, upon the ground that the evidence disclosed a dual agency here which, in no event, would impute knowledge to this company. Second, evidence tending to show knowledge to the agent is a violation of the parole evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exception by each of the defendants.

(Narrative continued.) At that time I attached the loss payable clause to those policies as agent for the company. I was not down at the fire that occurred there on September 6th; I was not at home. I was down there probably a week or ten days after. It was totally destroyed. I had been in the barn several times to see Mr. Scott on business. I have not the least idea of the amount of wool there.

Q. One or two stories of it?

The Court: Oh, yes; that is established, two stories to that building and a basement.

Mr. Monnett: Containing wool.

The Court: There were two stories that contained wool. It was piled up in the upper story and was stacked up in the lower story.

(Narrative continued.) I recall seeing Mr. Harrod at the bank about the 15th day of September. Mr. Stottsberry, the agent for an insurance company, and myself were with him. Mr. Scott was there, he came in afterwards. I think Mr. Harrod and Mr. Scott went out together, to my remembrance. I think they left together. I do not know whether they went over the losses together. These premiums on these policies were paid by him.

Mr. Edmonds: Which policies? He did not issue two of them.

L. A. Claypool.

Mr. Murphy: 1, 4 and 5 are under consideration and the money was sent to the company by you?

The Witness: Yes.

No cross examination.

And also:

L. A. Claypoole

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is L. A. Claypoole. I live in Cumberland, Ohio. I have lived there a little over eight years. I was living there during the year 1926 at or about the time Mat Scott's wool house burned. I am cashier of the Cumberland Savings Bank, the same bank that Mr. Bracken was in. I talked to Mr. Scott in the morning just after the fire.

Q. What, then, if anything, did you do in pursuance of that by way of communicating with the companies?

Mr. Edmonds: We object. What has this man got to do with the companies?

The Court: Nothing with the companies except that he may have transmitted a message on behalf of Mr. Scott to them. I do not know.

Mr. Monnett: They gave notice to the companies of the loss.

The Court: Who did?

Mr. Monnett: The bank.

The Court: For Mr. Scott?

Mr. Monnett: It does not make any difference who for. They gave notice of this fire. If they gave it I am entitled to that proof and they acted on it.

The Court: Notice that this witness would have sent to the insurance company at the request of Mr. Scott would be competent.

Mr. Edmonds: I did not understand the purpose of it.

Mr. Monnett: The purpose of it is to show that notice was sent in to the company.

The Court: He may testify.

The Witness: May I speak now.

The Court: Yes, it is your turn.

The Witness: Mr. Bracken, at the time of the fire was on a vacation in Cincinnati and Mr. Bracken and I had been connected in business for about eight years and he usually entrusts a large part of the business to me in his absence and I notified the companies because Mr. Bracken was the agent of those companies and I did it for Mr. Bracken.

Foster Scott.

(Narrative continued.) The notice I gave was telegrams, notifying them of the fire of Mat Scott's wool house. I remember Mr. Harrod coming into the bank, I can't say as to the date. It was shortly after the fire. Mr. Scott, the plaintiff, was in there with him.

The Court: What is the mystery of this meeting at the bank at that time?

Mr. Murphy: I don't know that there is any mystery. We want to show that Mr. Harrod and Mr. Scott were there corroborating Mr. Scott's statement.

The Court: There is not any question about that.

Mr. Edmonds: Scott signed the agreement on that date, the non-waiver.

The Court: I think you have got that established.

No cross examination.

And also:

Foster Scott

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is Foster Scott. I am the son of J. M. Scott, the plaintiff in this case. I live near the Village of Cumberland. I was living there in September, 1926. I know about the condition of my father's wool barn about the 6th of September, 1926, or immediately prior thereto. I have seen it a great number of times. It was pretty well filled, not to capacity. I have seen it enough that I could give an estimate of the number of pounds of wool there was in there. I believe there was at least seventy-five thousand pounds of wool in the barn. I know a considerable number of the persons from whom my father obtained this wool, not all of them. I am not at all interested in that wool. I sold him some wool myself, fifty-two hundred pounds, I think, in round numbers. That was in 1926. I sold him in 1925 about three hundred pounds less than in 1926. There was an electrical storm at Cumberland, Ohio, on or about three-thirty to four o'clock A. M. September 6th, 1926. I did not see my father's barn burn when the fire was at its height. I seen it a few hours later. The fire was visible, almost visible from the country, from the farm where I lived. The last name on the paper called plaintiff's Exhibit No. 9 is my signature. I sold forty-four hundred and ten pounds of wool. That was in 1925.

Cross Examination.

By Mr. Edmonds:

I did not assist my father in securing any lists of

Victor Scott.

wool growers that had sold my father wool. I am a

The Court: That is, he is not the only son, is that w you mean?

There are other sons. Victor Scott did that.

And also:

Victor Scott

called on behalf of the plaintiff, being first duly swo testified as follows:

Examined by Mr. Monnett:

My name is Mr. Scott. I am the son of the plaint J. M. Scott. At the time of the fire in September, 1 I was living at Cumberland, Ohio. I had lived there my life. I have been working with dad ever sinc was eight years old. In 1925 and 1926 I helped to wool in that warehouse.

Q. I will ask you if you were asked by anyone or y father to gather any names on or about November 3 1926, of people who had put wool in the barn prior the fire that was sold to your father, were you asked do that?

Mr. Edmonds: To which each of the defendants jects.

The Court: We are only interested in the fact, he do so.

Q. Did you do that? A. Yes, sir.

Mr. Edmonds: To which each of the defendants ject on the ground that the non-waiver agreement—

The Court: The objection is overruled. We have issue that the losses were not commensurate with claim made by the plaintiff, as I understand. It is cumbent upon the plaintiff to show what the losses w

Mr. Edmonds: We have to save our objection on other point so far as it is pertinent to the other.

Q. I hand you some papers marked Ehibits 9 to and will you state to the Court and jury whether had any knowledge of the collection of those names the data thereon.

Mr. Edmonds: Same objection.

The Court: Same ruling.

Exception by each of the defendants.

The Witness: This paper here I know.

(Narrative continued.) That paper is No. 9. T paper, I practically went out for my father and about every name that is on there. I rode i rain and there is the rain blot on there as I through the country. These other exhibits I got a or two on that. I did not get Exhibit 11. I did no

J. W. Spiker.

those two on Exhibit 13. I got practically all the names on that one,—that is 10. I didn't get any on 12. I guess I didn't get a name on that one, 8. I know those people personally that signed lists of the names 9, 10 and 11. It would be my judgment that was the amount of wool, substantially, that was delivered to the warehouse by those people. I bought some of it for my father. The amount I bought is represented on there by these names, and the amount on there is the correct amount I bought of these names, and that went into the warehouse that was burned. There were one hundred and forty-four sacks of wool on the lower floor, the first floor. Half of the third floor was filled with loose unwashed wool. I have been weighing, packing and hauling wool ever since I was nine years old. At the time of the fire there was seventy-five thousand pounds of wool in the first and second story. The market value of the wool on or about the 6th of September, 1926, at Cumberland was forty-one cents.

I was not present when Mr. Harrod was there. I was not present when Mr. Bracken or Mr. Stottsberry were there after the fire. I live in town. I did not have any connection with the wool. Father got me to help him the other day to make measurements of the barn. I was not there the day Mr. Harrod measured it.

No cross examination.

And also:

J. W. Spiker

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is J. W. Spiker. I live in Ava, Noble County, Ohio, probably four miles from the village of Cumberland, Ohio. I know J. M. Scott, the plaintiff in this action. I have had occasion to go to J. M. Scott's wool barn in the village of Cumberland, Ohio. I was there on Saturday before the fire. I was in the first and second story of the barn. I saw quite a bit of wool laying there on the first floor. I went from the first floor to the upstairs. There I saw quite a bit more wool, loose wool. Hasbucky was the man I went there to see, he was selling his wool to Scott. The fire took place the next Monday morning, if I remember right.

No cross examination.

J. W. Cobert. Lee Glass

And also:

J. W. Cobert

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is J. W. Cobert. I live in Cumberland, Ohio. I have lived there thirty years. I personally know J. M. Scott. I recall an occasion when he had a fire of what is known as his wool barn in the village of Cumberland. I was at that fire. I was at that fire awhile after it commenced to burn, about four o'clock in the morning and somewheres near there. When I first went there I saw this barn of Mr. Scott's burning. When I first went I didn't see anything but as the fire burned on I seen wool falling, burning. It was loose wool falling from this second floor. I stayed at the fire an hour or more, I suppose. During that time this wool was falling most all the time I was there. I seen wool falling, burning as it fell. I had not been at that barn prior to that fire. I had not been about the barn a week or two weeks before the fire. When I was at this fire I saw Mr. J. M. Scott, the plaintiff, around there.

No cross examination.

And also:

Lee Glass

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is Glass. I live in Cumberland, Ohio. I have lived there around thirty years. I know J. M. Scott, the plaintiff in this action. Yes, I remember the morning that he had a fire in his barn. Had quite an electrical storm the morning of that fire. That night or morning I was in bed. It was pretty severe, pretty severe shock on me. It aroused me. I live in the neighborhood of a thousand or twelve hundred feet, I think, from what is called the J. M. Scott wool barn that was burned up. After I was aroused I got up and went out on the porch and I went along the side porch to look in the direction of the report of the thunder and lightning where I got the location, it was right about in the middle of where the fire was. I went to bed and it was probably a half an hour, maybe more, before I saw a fire. His barn was all in flames when we got there. You could see wool burning there for several days. I would say it was three or four days after I saw this fire that I saw wool burning.

No cross examination.

W. P. Smith. J. D. Collins.

And also:

W. P. Smith

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is W. P. Smith. I live in Reinersville, about twelve miles south of Cumberland. I am a farmer and a wool buyer. Sometimes I am a wool seller. I have been a wool buyer for thirty-three years. I bought wool in the vicinity of Reinersville, Morgan County and Noble County and also Washington County. I think the character of wool in the neighborhood where I have been buying wool compares very favorably with that in and about Cumberland. The reasonable worth of unwashed Delaine wool on the market in the vicinity of Trumbull County and Guernsey County, Ohio, on September 6th, 1926, was about forty-two cents. I did not buy any wool for Mr. Scott in 1926. I bought the wool for Scott in 1925. That is my name on Plaintiff's Exhibit No. 9; that handwriting is mine. That particular time I sold Mr. Scott 12,531 pounds. This wool was hauled from my place about October, 1925, to Cumberland for Mr. Scott. I remember of hearing of this fire of J. M. Scott's barn. I was never there.

Cross Examination.

By Mr. Edmonds:

I bought this wool in 1925 on Mr. Scott's account; I bought it for Mr. Scott. I paid fifty cents for it for him. The price of wool generally was much higher in 1925 than it was in 1926; that is a fact. It was going down considerably in 1926 over what it was in 1925, about eight cents on the pound, from eight to ten cents owing to the quality. That would be true of September 6th, 1926.

And also:

J. D. Collins

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Monnett:

My name is J. D. Collins. J. D. Collins and Son signature on Defendant's Exhibit 8, is mine. I know J. M. Scott, the plaintiff in this case. I have known him about twenty years. I sold him 1780 pounds of wool in August, 1925. That went to his warehouse on a back street, back of the garage. I was in the warehouse in 1926. I was in the warehouse three or four days before the 19th of August. I was in the building a good many

times, I could not just tell the size. I know it had t stories. I was in the second story about a week bef the fire, three or four days before the 19th of August. observed a big pile of wools on the second floor and lower floor full of sacks of wool. I did not pay any tention what the wool sacks ran per pound. I do know just what wool and wool in sacks in Cumberla on or about September 6th, 1926, was selling at, but know what I got for mine in August. In August, 19 I got forty-one cents. I saw the fire after it fell in. could not say how soon after the fire that I saw t building. I live two miles out in the country. When got the word we went down the road and it was pret back, the building all fell in. I did not hear any thund that night. I live two miles from Cumberland. It look to me like wool burning, like wool when it went dow A pile of stuff there.

And thereupon the plaintiff rested.

Mr. Edmonds: At the conclusion of all of the ev dence offered by the Plaintiff, the Defendants, The Hom Insurance Company, the Norwich Union Fire Insuran Company, the New York Underwriters Insurance Co pany, the Sun Insurance Office and the Westchester I surance Company, separately and severally move th Court to strike from the record and exclude from th consideration of the jury the evidence offered by th Plaintiff tending to show knowledge on the part o Bracken of the existence of the chattel mortgage.

Also evidence tending to show knowledge of Stott berry of the existence of the chattel mortgage.

Also to strike from the record and exclude from th consideration of the jury the evidence offered of th alleged statement by Harrod to the plaintiff requesti him to secure a list of names of owners or sellers of wo and testimony as to statements claimed to have be made by Harrod to the plaintiff as to the effect of suc statements if obtained.

These motions are made severally and separately up the ground, first, that the evidence offered as to t knowledge of Bracken and Stottsberry, the solicitin agents, violates the parol evidence rule. Second, that disregards the limitation of authority of agents co tained in the policies limiting the authority of agents change or alter the contract of insurance except written endorsement thereon, and finally upon t ground that, as to Bracken the evidence shows that was at the same time local soliciting agent for three the companies in suit, defendants in these suits was at the same time cashier or assistant cashier—

The Court: Do you mean that incapacitates him because he was an officer of the bank from being an agent of the insurance company?

Mr. Edmonds: It is an additional reason why his knowledge would not be imputed to the company and would not bind the company.

The Court: You claim then that if his knowledge otherwise could be imputed to the company that because he was an officer of the bank it could not be imputed?

Mr. Edmonds: Yes, that is the point.

The Court: I might say with a good deal of confidence at this time that I do not think there is anything in that theory. The big question that you are saving is, whether or not, notice to him was notice to the company That is your point and that is an open question.

Mr. Edmonds: I would like an opportunity to submit the authorities. The question also is raised on the motion for a directed verdict which I wish to make at this point. I did not know whether the Court wished to pass on the exclusion of the evidence at this time.

The Court: The motion is made and is subject to a ruling. Have you any other motion?

Mr. Edmonds: Yes. Now come the defendants, The Home Insurance Company, the Norwich Union Fire Insurance Society, The New York Underwriters Insurance Company, the Sun Insurace Company Lmtd., the Westchester Fire Insurance Company, and at the conclusion of all the evidence offered by the plaintiff and separately and severally move the Court to direct the jury to return a verdict in favor of the several defendant Insurance Companies in each of the cases here involved, severally and separately, upon the grounds:

1. As to the suits against the Home Insurance Company, The Norwich Union Fire Insurance Society, Ltd., and Sun Insurance Office, as defendants:

There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. As to all five of the suits in trial.

The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish [illegible] agreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as

a condition precedent by the policies and there is evidence of waiver or estoppel to assert this defence.

And thereupon the further hearing of this case was adjourned until Thursday morning, June 14, 1928, at nine thirty o'clock A. M.

Thursday Morning Session.
June 14th, 1928.

Mr. Monnett: The plaintiff makes a motion that the Court submit the question to the jury on the evidence and instruct the jury to return a verdict for the plaintiff on the same grounds heretofore named, to-wit, that they did not tender back before the suit or any other time the amounts paid for the respective premiums.

The Court: That motion is overruled and exception is noted.

Let the record show that the plaintiff's case is opened for the purpose of receiving additional proof in order to complete the record, and that is the document which is marked Exhibit No. 24.

And Be It Further Remembered, That the plaintiff to further maintain the issues on his part to be maintained introduced and offered in testimony the following evidence, to-wit:

Mr. Monnett: We desire to tender in evidence this document which is marked Exhibit No. 24.

The Court: Are there any remarks?

Mr. Edmonds: No.

The Court: It is admitted.

And thereupon the document above offered was admitted in evidence on behalf of the plaintiff and is herewith submitted marked Plaintiff's Exhibit No. 24 and made a part hereof.

And thereupon the plaintiff rested.

And thereupon the defendants and each of them severally renewed their motion as heretofore set out at the time the plaintiff first rested, for directed verdicts in favor of the several separate defendants upon the following grounds:

1. As to the suits against The Home Insurance Company, The Norwich Union Fire Insurance Society and the Sun Insurance office, as defendants:

There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. As to all five of the suits in trial:

The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

The Court: The matter submitted to the Court at this time is upon the motions of the defendants, severally, to direct a verdict for the various reasons appearing in the motion made on the record. The chief and primary question raised by that motion is as to the effect of a condition which is common to all five of the policies, having to do with the necessity for the reformation of the policies because of a loan on the subject matter of the personal property made in the nature of a chattel mortgage. The principal part of the discussion is that point that is raised in the motion.

In the arguments there have been cited a great number of cases both in the State of Ohio and from the United States Courts, and from the Court of Appeals, particularly, of the Sixth District in which we are primarily interested.

The rule in Ohio is announced and settled by the decision in the 101st Ohio State, which is distinguished from the case in the 82d Ohio State. The subject of the property insured in that case is real estate and the question arose because there was a defective title to the real estate. The Court held, in general terms, that the Statute 9586 of the General Code, referred to the authority of insurance agents, and knowledge by the agent, brought knowledge to the insurance company in that case and the insurance company was bound. That, of course, was later followed and very recently followed by the case reported in the October Monthly Law Bulletin known as the Glass case and the subject matter in that case referred to a mortgage on chattel property, personal property. So that there can be no question about the rule in Ohio.

Now the rule in Federal Courts is and has been from time immemorial, as well as elsewhere, that parole evidence is not admissible to vary the terms of a written contract. Upon that principle of law I think it may be stated that the decision of the Sixth Circuit Court of Appeals was made in the Hartford Insurace Company against Nance and Jones. As I have heretofore remarked, those holdings, and that decision, seem to be at odds with the rule laid down by the Court of last

resort in Ohio, and that is because those two cases d
tinguished between questions arising in connection w
the validity of the contract itself and questions arisi
which have to do with the rule of property which is t
subject matter of the particular insurance. The Co
of Appeals put that in a category which must be decid
under the statutes of the given state and decisions
the court of last resort of that state and they furth
distinguish the cases beore them as applying to t
other class which has to do and is related to the gener
law of jurisprudence, and questions of that nature mu
follow the United States Federal decisions. To fortif
their position and decision in that respect they hav
cited some several decisions of the United States Su
preme Court.

So that, taking the Federal decisions of this Circu
and analyzing them in the light and along with the de
cisions of the Ohio State Supreme Court upon the sam
subject, the distinguishing features which I have men
tioned are very apparent and are very plain and clearl
drawn so that we may say from a Federal standpoin
that the law having to do with the validity of the insu
ance contract is referable to the State law, and the la
having to do with the rule of property governing th
subject matter of insurance is also referable to Stat
law and that other questions that bring themselves forth
under the category of the general law of jurisprudenc
are referable to the holdings of the United States Courts
both Supreme and subordinate.

We have before us proof that has been admitted, and
admitted under objection, some of it admitted upon th
theory that the Court might later find it necessary to
withdraw it from the consideration of the jury if there
were no jury questions. So far as this one question i
concerned that relates to the evidence that was offered
and received temporarily in reference to the chattel loa
and the chattel mortgage and what was done by th
insured and by the bank from whom he made his loa
and gave his chattel mortgage and the local insuranc
agents in regard thereto; and it developed that in thre
of the policies, namely, 1, 4 and 5, the insured informe
the local agents—two local agents involved, one of who
was an officer of the bank where the insured transacte
his business and made his loan. Of course, that partic
lar agent was cognizant of the loan because he mad
the loan as an officer of the bank, and what the insur
did was to notify him of the loan and also notify th
agent of the companies of the loan that had to do wit

policies 2 and 3. Those agents knew necessarily of the loan. There can be no question about that. The only question about it is whether it is proper evidence to be produced from the witness stand under the parole evidence rule. What transpired in reference to a chattel mortgage that was consummated in the execution and delivery of what is now known as Plaintiff's Exhibit 24, is related to a rule of property. It is called in the pleadings a chattel mortgage.

It is a written document. Is it a chattel mortgage? An inspection of the document itself discloses the fact that there is no statement or claim as is made mandatory by the statute of the State of Ohio. A further inspection of the Exhibit itself discloses the fact that there are no file marks on it, that the injunction of the statute that the proper officer endorse the time when it is filed and the date when filed and that it was filed, are altogether wanting on this document. Furthermore, the interpretation of those sections of the statute, General Code of Ohio, by the Supreme Court of the State of Ohio is to the effect that a chattel mortgage, or a document of that kind does not rise to the dignity of a chattel mortgage for the reason that it cannot operate against creditors and it simply remains a contract between the parties to it without, in any way, affecting the rights of other parties. If it is a contract between the so-called and named mortgagor and the so-called and named mortgagee in the document itself by which an undertaking is made by the mortgagee to furnish so much money, and an undertaking is made by the so-called mortgagor to grant a lien upon certain personal property, that will be good in the hands of the parties themselves as against the rights of all creditors, general and special, it becomes merely a collateral contract the same as the giving of a promissory note, and had to do with the rule of property, and it is governed by the law of the State of Ohio and the decisions of the State Courts.

Furthermore, by giving notice of the loan that was to be made shows on the part of the insured the lack of any attempt to commit any fraud upon the insurance company and no doubt the transaction was handled between the insured and the insurance agents as a chattel mortgage and no doubt what the insurance agents did on behalf of the insured was to protect these insurance policies because of that loan. There is no question about that. So that the evidence that has been introduced here relative to the wording contained in the riders upon

those three insurance policies and the facts that
offered surrounding that transaction is not parol
dence to vary the terms of any written contract but
ply parol evidence to interpret the language used
those riders, and the non-effect of this transaction
chattel mortgage must be held to be a rule of prope
governed by state laws, and governed by the laws of
State of Ohio and the decisions of the State of Ohio
because that is so the cases of the Hartford Insura
Company against Jones, and Hartford Insurance Co
pany against Nance are, to the extent I have indicate
non-applicable to the issues that we have before
Court here. The waiver agreement, or the non-waiv
agreement as to the terms according to the construct
that I have been able to put upon it is simply a sto
cock. It is a paper which the adjuster sought and
ceived the signature of the insured to hold matters
status quo until an examination could be made of
enormity and quantity of the loss, and there is not a
agreement here between the parties about which to
agree. The evidence on that subject in general terms
something like this: The adjuster came, sought an
terview with the insured, accused him in broad terms
burning down the property and told him what he wou
have to do before they would have the material on whi
to base proof of loss. To that the assured acceded a
immediately started to work to get the information
gether. Later, and within sixty days, as provided
the policies, proof of loss was forwarded to the insu
ance companies. After some little time, after the co
pany had digested, presumably, or made an examin
tion of those proofs of loss it sent word to the insur
that the parties are under disagreement about
claim for loss. That is all that was done. There was
negotiation about it. There was not any confere
about it. They set off in their respective offices out th
respective head offices in the east, and sent word back
this insured that the parties disagreed, and, therefor
is claimed here at this time in the orderly trial of this
suit that the insured is deprived of his remedy and w
he should have done was to have erected and construc
a board of arbitration and secured the decision o
board of arbitration on the value of all of this prop
It does not appear whether that should be with the
sent or the non-consent of the insurance companies.
do not know. But that is what is claimed, that he sh
have done and before bringing suit. That was in
bent upon him and necessary for him to do as a ste

Mr. I. Edwin Stottsberry.

development precedent to bringing suit. My own notion is that an insurance company cannot sit off in an isolated manner of that sort and allow matters to drift to an unreasonable time and thus claim in a Court of Law that the Court has not any jurisdiction over the suit because the insured did not do thus and so. I do not think the failure to offer to tender back insurance premiums would have anything to do with the issue before this Court at this time unless it be as a very slight element related to the question of estoppel. There is not very much in this record on the question of the non-tender of insurance premiums. Whatever there is in the record will remain in and cannot be prejudicial to the interest of either or any party. The conclusion is, that the motion to direct a verdict may be overruled and the motion to withdraw testimony offered which was objected to at the time by the defendants and admitted over the objection of the defendants, that motion may be also overruled and each of the defendants may have exceptions to the rulings of the Court on each of the motions. You may call the jury.

Mr. Edmonds: To all of which rulings each of the defendants severally except.

Mr. Edmonds: May I just say one word, Your Honor, as to the chattel mortgage proposition that the law of Ohio would govern. We have not had an opportunity to present to Your Honor the law of Ohio as to the effect of that chattel mortgage so signed is a defense and we would like to do so, if Your Honor would care to hear from us.

The Court: No.

Be It Remembered, That the defendants, to maintain the issues on their parts to be maintained, introduced and offered in testimony on their behalf the following evidence, to-wit:

Mr. I. Edwin Stottsberry

called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. Edmonds:

My name is I. Edwin Stottsberry, and I live at Zanesville now, formerly lived at Cumberland; and was a local agent in 1926 at Cumberland for the New York Underwriters Insurance Company and the Westchester Fire Insurance Company, and as such agent countersigned the two policies, Plaintiff's Exhibits 3 and 2. The fire occurred on the 6th of September, 1926, to the property described in these policies.

"Q State whether or not until after that fire occu
you ever had any knowledge that any of the wool
scribed in those policies was encumbered by cha
mortgage.

Mr. Monnett: Waft. I thought that was out of
issue. There is no chattel mortgage,

The Court: Let him answer the question. Of co
it is out of the issue.

"A. It was not clear in my mind that way. I did
understand that there was a mortgage on it.

Mr. Monnett: Inasmuch as they have not shown
chattel mortgage we object to it at this time.

The Court: Objection overruled and excep
noted.

No cross examination.

Mr. Edmonds: Each of the defendant insurance c
panies rest.

And thereupon each of the defendant insurance c
panies rested.

Mr. Edmonds: At the conclusion of all of the
dence——

The Court: You wish to reiterate your motion?

Mr. Edmonds: There is no rebuttal?

Mr. Monnett: He did not claim there was a mortg
he just said he didn't know there was any.

Mr. Edmonds: Now come each of the defendant
surance companies, The Home Insurance Company,
Norwich Union Fire Insurance Society, The New Y
Underwriters Insurance Company, the Sun Insura
Office, The Westchester Fire Insurance Company
each severally move the Court to direct the jury to
turn a verdict in favor of each several defendant in
ance company on the following ground:

1. That the evidence, without dispute, and the pla
ings and admissions therein establish violation of
condition prohibiting the chattel mortgage contained
the policies and that no evidence of facts constitut
waiver or estoppel to assert this defense has been
fered.

2. Upon the ground that the evidence, without
pute, establishes that subsequent to the fire in que
the plaintiff and each of the defendant insurance c
panies severally disagreed as to the amount of
claim by reason in question to the property there
in each of the several insurance contracts, and that
amount of the loss has never been ascertained by
praisal and that there is no evidence in the case of

constituting waiver or estoppel against the insurance companies or any of them to assert this defense.

Upon the ground that the evidence, without dispute, establishes that three of the insurance contracts in suit, namely, the policy of the Home Insurance Company, the policy of The Norwich Insurance Society and the policy of The Sun Insurance Office contain loss payable clauses making the laws, if any, in case of fire, payable not only to the plaintiff but also to the Cumberland Savings Bank and Trust Company and there is a non-joinder of necessary parties plaintiff in these actions and the same are not brought by the real party in interest.

The Court: That motion, as made, may be overruled, and the defendants, respectively, have their exceptions to the ruling of the Court.

Mr. Edmonds: To all of which rulings each defendant severally excepts.

Mr. Monnett: We ask the Court to instruct the jury to bring in a verdict for the plaintiff for the full amount with interest from the date of the fire against each of the insurance companies, full amount of the policy with interest from the 6th day of September, 1926, as the evidence now stands.

The Court: The motion of the plaintiff may be sustained with modification and limitation.

The jury may be instructed to return a verdict upon policies 1, 4 and 5 and the motion as it applies to policies 2 and 3 may be held in suspension until the court submits to the jury the request for a special verdict upon the question of notice to the agent of the respective insurance companies holding policies 2 and 3.

Gentleman of the Jury, the view taken by the Court upon a number of questions——

Mr. Edmonds: I would like to except to the Court's ruling in sustaining the motion for the reasons:

There is a non-joinder of necessary parties and the cases are not brought in the name of the real party in interest because of absence of the bank which is payee in the cases based on policies payable to the bank, in the cases against the Home Insurance Company, The Norwich Union Fire Insurance Society, Ltd., and The Sun Insurance Office.

In all the cases: The evidence and pleadings establish without dispute incumbrance by chattel mortgage with consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases: The evidence and pleadi... without dispute establish a disagreement between pla... tiff and each defendant as to the amount of the loss a... the amount of the loss has not been ascertained by a... praisal as required as a condition precedent by the po... cies and there is no evidence of waiver or estoppel ... assert this defense.

Mr. Edmonds: I understand the Court announc... that he would sustain the motion so far as policies 1, ... and 5 are concerned.

The Court: You may have your exceptions right no... or later.

Exceptions noted.

As I started to say, the questions submitted to th... Court at the close of the plaintiff evidence were such that a great many, or practically all the questions tha... arise, according to the Court's view of the issues in th... five cases that we are trying, are issues addressed to th... Court and not to the jury. In other words, they ar... issues of law other than issues of fact and that is th... reason for the sustaining of the motion in reference t... three out of the five cases which are before the Cour... And, as I said, I desire to submit to the jury a reque... for a special verdict upon the question as to whethe... or not the local agent of the insurance companies, unde... policies numbered 2 and 3, and which are the polici... of The New York Underwriters Company and of Th... Westchester Fire Insurance Company, of whom the las... witness that was on the witness stand was the local agent and secured policies from the insured, whether ... not that agent had notice of this loan. Now, we hav... before us the evdence of some witnesses who testifie... upon this subject, that is, the question whether Mr. ... Stottsberry, the agent, knew of, and was apprised of t... fact that it was contemplated to take a chattel mor... gage on this wool; that is, the local bank to take a cha... tel mortgage upon the wool from the owner of the wo... the plaintiff in the case, Mr. Scott. The agent himse... has been on the stand for the defendants and his tes... mony for the defendant is all the testimony and all t... facts which you have from the standpoint of those tw... defendants, and he testified that he did not understa... it that way, or you will remember what he said in th... regard. The question for you to determine, and the on... question for you to determine, is whether the agent, t... local agent, Mr. Stottsberry, had notice of the contem... plation of taking a loan upon this wool by a so-call... chattel mortgage and that the loan was made.

In solving this problem you will cast the burden ...

proof upon the plaintiff and the plaintiff must satisfy you by a preponderance of the evidence, that is, the greater weight of the evidence, not necessarily the greater number of witnesses, but the greater weight of the evidence, and you are the sole judges of the weight which you will give to the evidence of any witness and all the witnesses.

The credibility of witnesses is a matter for your sole solution. You may believe all a witness has said or nothing he has said or a part of what he has said and disregard the remainder of what he has said, as unworthy of belief. That is what credibility means. Just worthiness of belief.

I think you understand that the only issue that is put up to you is that of a special verdict to ascertain that fact. You may retire.

The clerk will furnish you with the blanks in order for you to perform your duty. That means that I have just put up to you that one question. As soon as you have solved it you may report it back into Court. You may retire.

Mr. Edmonds: The defendants except to the statement of the Court that there were witnesses who testified that Stottsberry knew it was contemplated to take a loan.

The Court: You except because that is plural instead of singular?

Mr. Edmonds: Yes.

The Court: Gentlemen of the jury, objection has been made to the statement of the Court to you in the instruction where I used the language that witnesses had testified in reference to the notice of the agent Stottsberry. That objection is, I am told, because I made it plural. It is plural or singular, depending upon what you find about it.

Mr. Edmonds: And the defendants in the presence of the jury each except to the Court's charge to the jury that knowledge of the agent would be material, either of a chattel mortgage theretofor obtained, or of a chattel mortgage proposed to be obtained in the future, to that end of the defendants except for the reason that the evidence upon that point is immaterial and constitutes a violation of the parol evidence rule and disregards the limitation of the agent's authority contained in the insurance contracts.

And the defendants object and except to the admission of the special verdict to the jury on that issue.

The Court: Exceptions may be noted and you retire, gentlemen.

And thereupon the jury retired and after brought in a verdict against the two companies.

The Court: The special verdict of the jury has been returned the motion of plaintiff insofar as it ap to the two defendants, The New York Underwriters The Westchester Fire Insurance Company, being un posed of, it is the conclusion of the Court that the cipal sum of each of those policies are recoverable the plaintiff and verdicts may follow accordingly, thus the motion, as originally made, is now sustai as to each defendant and the jury instructed to ret the verdicts.

Mr. Edmonds: To which each of the insurance co panies except on the same grounds as heretofore sta in the motions made for directed verdicts in favor the respective insurance companies and also upon ground that the Court is without jurisdiction to de mine the amount due but that the matter should be mitted to the jury to determine the extent of the and the amount due, if any, under each defendan respective policy.

Mr. Monnett: Interest is computed from the date the fire, the day that the loss occurred.

Mr. Bibbee: No.

The Court: That is right? That is what you sue is it?

Mr. Edmonds: You did not put that in the form of instruction.

The Court: That would necessarily follow.

Mr. Edmonds: Our position is that the policy pr vides that it is not payable until sixty days after pro of loss or award of appraisals therefor and until p able it could not draw interest.

Mr. Monnett: We consent to put in remitturs, if t computation is wrong.

Mr. Edmonds: Each of the defendants except to order of the Court in directing verdicts for the amount of each policy with interest from the dat the fire for the additional reason, in addition to reasons heretofore stated, that the policies provide they are not payable until sixty days after proof loss are furnished or until sixty days after the a has been rendered when required and that interest any amount due under the several policies would therefore, begin to run until sixty days after proo loss were rendered or until sixty days after the a

had been rendered where an appraisal has been required as in these cases.

Now comes each of the defendants and severally except to the action of the Court in directing the jury to return verdicts in each of these cases in favor of the plaintiff for the same reasons stated in support of the motions for directed verdicts made on behalf of each defendant, namely:

1. In the cases in which The Home Insurance Company, The Norwich Union Fire Insurance Society Ltd., and the Sun Insurance Office are defendants, there is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. In all of the cases the evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases the evidence and pleadings without dispute establish a disagreement between the plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

4. That the court had no jurisdiction to determine the amount due.

5. That the amount for which the court instructed the jury to return verdicts in each case is excessive.

The jury then retired and thereafter returned into court with its separate verdicts in favor of the plaintiff and against the several defendants in accordance with the direction and instructions of the Court as appears from the record herein.

Thereafter, within three days after the rendition of said verdicts defendants each filed their separate written motion for new trial and to set aside the separate verdicts against them for the reasons and upon the grounds set fort has appears of record herein, all of which motions the court on consideration, thereafter overruled, and did render separate judgments on said separate verdicts against the several defendants and in favor of the plaintiff as appears of record herein, to all which actions and rulings of the court the several defendants, at the time severally excepted.

And now, in furtherance of justice, and that right may be done, the defendants present the foregoing as their

Narrative Form Bill of Exceptions taken in the tri... the above causes, a true and correct copy of the evid... verbatim and of this Narrative Form Bill of Ex... tions each having been heretofore lodged herein ... the Clerk of this Court, which they pray the Court ... be allowed signed and sealed and ordered to be ... a part of the record in these causes. And it appear... to the Court that the defendants have given to the pl... tiff due notice of such lodgment, and no objections ha... ing been filed thereto by the plaintiff, the Court ... that the said narrative statement of evidence and ... exhibits attached hereto and made a part hereof is ... of the evidence offered or received on the trial of ... above entitled causes and is correct in all respects, ... is properly prepared, does therefore approve, settle ... allow the same; and said statement having now ... approved by this Court it is hereby ordered that ... foregoing Narrative Form Bill of Exceptions be filed ... the office of this Court and become part of the reco... herein and settled and allowed, signed and certified ... the Judge as provided by law, all of which is accor... ingly done on this twenty-second day of September, 19...

In testimony whereof, the undersigned, the judge ... this Court who presided at the trial of said causes ha... hereunto set his hand this 22 day of September, 192...

Approved:

Benson W. Hough,
Judge of the United State District Court for the South... ern District of Ohio, Eastern Division.

Approved:

James Joyce,
F. S. Monnett and
Elwood Murphy,
Counsel for Plaintiff.

.....,
Counsel for each Defendant.

PLAINTIFF'S EXHIBIT No. 1.

No. 173

Stock Company
The Home Insurance Company
New York
Organized 1853.

Amount $8000. Rate $1.27. Premium $101.60.

In Consideration of the Stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the sixth day of July 1926, at noon, to the sixth day of July, 1927, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said

struction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the fore

going stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents: but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do;

but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quan-

ties not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days

notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the

title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises

endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 2.

No. 21023. Stock Company.

New York Underwriters Insurance Company

Amount $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage, by fire, except as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Exhibits.

Uniform Standard Ohio — Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated West side of Cambridge St., Book No. 50 Map No. 117½, City Town of Cumberland, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 21023 of the New York Underwriters Insurance Company of New York City

City.

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio—786.

A. R. Stoddart, Secretary. R. M. Bissell, President.

Exhibits.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed

hereon, for loss to awnings, bullion, coin, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculptures, trade or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this

policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and

shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

Exhibits.

insured and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 3.

No. 969337. Organized 1837.

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $74.00.

In Consideration of the Stipulations herein named and of Seventy-four & No/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the first day of April 1926 at noon to the first day of April 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '24)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated west side of Cambridge street, Book No. 50 City Town of Cumberland, State of Ohio. This item shall also cover said merchandise within one Hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for

more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 969337 of the Westchester Fire Insurance Company of New York.

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated April 1, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following

stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation, and is issued under and in pursuance of Sections 130, 131 and 132 of the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, President.

Countersigned at Cumberland, Ohio, this 1st day of April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable

time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of

the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, cover-

ing any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for

a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 4.

No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office
63 Threadneedle St.
London, Eng.

U. S. Branch
54 Pine Street,
New York.

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June

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1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:
Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to

keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 228271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberlan Ohio Agency.

Dated June 14th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio, subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office Chicago Ill.

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascer-

tainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom

of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, un-

loss duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing

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by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its

part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to

Exhibits.

such provisions and conditions no officer, agent, or representative shall have such power or deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,
Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland O., this 14 day of June 1926.

J. M. Bracken, Agent.

PLAINTIFF'S EXHIBIT No. 5.

No. 223. Stock Company. $5750.

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch No. 75 Maiden Lane, New York
Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire except as hereinafter provided, To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the

insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, wher mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured

in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated June 24th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June, 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

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By their Attorney duly authorized.

Hart Darlington, Manager.
J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed

hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this

policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and-

shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 6.

(Package of cinders or ashes of burned wool, and as attached to bill of exceptions, but omitted from printed record by stipulation.)

PLAINTIFF'S EXHIBIT No. 7.

Non-Waiver Agreement

It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept 6 1926 to property located in rear lot W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.

In The Event of the failure of the parties hereto to agree as to the amount of said loss and damage, the question of the amount thereof shall be determined by apprisal, as provided in the conditions of the policies of Insurance.

Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

The Sole Object And Intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto.

Witness our hands in duplicate, this 15 day of Sept 1926.

J. M. Scott
Companies in interest.
A. C. Harrod, Adjuster.

Witness:
I. E. Stottsberry,
J. M. Bracken.

EXHIBIT No. 14.

To The Home Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.

Policy No. 173
Amount of Policy — $8000.00
Rate — 1.27
Premium — $101.60

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool

or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of The Home Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $8000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $20,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Exhibits.

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B".

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 286271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

No. 173

Stock Company
The Home Insurance Company
Organized 1853.

Amount $8000. Rate 1.27 Premium $101.60

In consideration of the stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does insure J. M. Scott for the term of one year from the sixth day of July, 1926, at noon, to the sixth day of July 1927 at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

Exhibits.

Form No. 212 attached to Policy.

Uniform Standard Ohio — Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming a part of Policy No. 173 of the Home Insurance Company New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York.

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist

or be claimed by the insured unless so written or attached.

In witness whereof this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized agent of the company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establish-

ment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but

liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions

and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the

amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the

loss; be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 15.

To the New York Underwriters Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 21023
Amount of Policy—$3500.00.
Rate—1.27
Premium $44.45

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool; wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor

Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of New York Underwriters Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $3500.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $24,500.00, all of which is specified in Schedule "B" together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurement on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at

Exhibits.

Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be apprised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags.	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building occupied as wool storage, situated west side of Cambridge street risk #50 map 117½.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½.

No. or Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

Exhibits.

No. 21023. Stock Company.

New York Underwriters Insurance Company

New York

Amount. $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage, by fire, except as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212

(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated west side of Cambridge street, Book No. 50 Map 117½ City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said

Exhibits,

building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 21023 of the New York Underwriters Insurance Company of New York City

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or

conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio—786.

A. R. Stoddard, Secretary. R. M. Bissell, President.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Exhibits.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by

order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

Exhibits.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish

a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or

condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 16.

To the Westchester Fire Insurance Company, of New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 969337
Amount of Policy—$5000.00.
Rate 1.48
Premium—$74.00.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

Exhibits.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Westchester Fire Insurance Company, of New York, of its proportion of the above loss, under said policy, the sum of $5000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $23,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were

a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while

contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.

Wool Form.

No. 969337. Organized 1837.

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $74.00.

In Consideration of the Stipulations herein named and of Seventy-four & No/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the first day of April 1926 at noon to the first day of April 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '24)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated West side of Cambridge Street Book No. 50 City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building; all only while in transit to and from said building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and

the insurance, if any hereunder, on contents of any building here described, is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 969337 of the Westchester Fire Insurance Company of New York

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated April 1, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation, and is issued under and in pursuance of Sections 130, 131 and 132 of the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, President.

Countersigned at Cumberland, Ohio, this 1st day of April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any

material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein de-

scribed, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of

fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or [illegible] by solvent or insolvent insurers, covering such prop[illegible] and the extent of the application of the insurance und[illegible] this

policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured, for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 17.

To the Sun Insurance Office, Western Department, 76 West Monroe St., Chicago, Ill.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. C 288271.
Amount of Policy—$5750.00.
Rate—1.27
Premium—$73.02

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story

slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Sun Insurance Office, Western Department, of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the

conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

[Notarial Seal.]

B. F. Enos,
Notary Public.

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June 1925)

Wool Form.

$5750.00. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also

Exhibits.

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York.	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June 1925)

Exhibits.

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland. No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office
63 Threadneedle St.
London, Eng.

U. S. Branch
54 Pine Street,
New York.

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to policy.

Uniform Standard Ohio

Form No. 212
(Edition June '25)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable ther[illegible]r, this item shall also cover such merchandise held [illegible] trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys; yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, im-

provements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberland Ohio Agency.

Dated June 14th 1926 19.....

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the

Exhibits.

assured shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio.
subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office, Chicago Ill.

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if

the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage

by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained

shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the

amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, pri-

vate or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property, of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid

Exhibits.

until countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,
Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland, O. this 14 day of June, 1926.

J. M. Bracken, Agent.

EXHIBIT No. 18.

To the Norwich Union Fire Insurance Society Ltd., 75 Maiden Lane, New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 223.
Amount of Policy—$5750.00.
Rate—1.27
Premium—$73.02.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

Exhibits.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Norwich Union Fire Insurance Society Ltd., of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the

Exhibits.

same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enes,
Notary Public.

[Notarial Seal.]

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags.	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office, New York.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

No. 223. Stock Company. $5750.

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch No. 75 Maiden Lane, New York
Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth

day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire as hereinafter provided. To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge street risk 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

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Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland, O. Agency. Dated June 24th 1926

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition added hereto, and as to such provisions and conditions of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed herein or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

By their Attorney duly authorized.

Hart Darlington, Manager.
J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any

fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

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This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro-rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building hereby described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and

specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost; at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this

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policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municip , this company shall, on payment of the loss, be subroga ed to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 19.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio.

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Home Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #173 of the Home Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered

Exhibits.

policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Home Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Home Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 20.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The New York Underwriters Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #21023 of the New York Underwriters Insurance Company for loss said to

have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but it is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The New York Underwriters Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the papers purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
New York Underwriters Insurance Co.
By A. C. Harrod,
Adjuster.

EXHIBIT No. 21.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Westchester Fire Insurance Company has referred to the undersigned for reply the type-written statement

Exhibits.

purporting to be sworn to by you wherein claim is made by you under Policy #969337 of the Westchester Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Westchester Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereon caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Westchester Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 22.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Sun Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #C 288271 of the Sun Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Sun Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Sun Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 23.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Norwich Union Fire Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #223 of the Norwich Union Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Norwich Union Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Norwich Union Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 24.

Know All Men by These Presents: That J. M. Scott, Grantor in consideration of the sum of Eighteen Thousand Two Hundred Dollars to me paid by The Cumberland Savings Bank Company, Cumberland, Ohio, a corporation, Grantee the receipt of which is hereby acknowledged, do.. hereby Bargain, Sell and Convey to the said Grantee their successors and assigns, the following described goods and chattels, to-wit: Being Forty Thousand five Hundred pounds of wool stored in barn located at rear of lot on west side of Cambridge Street, Cumberland, Ohio.

The Condition of this Conveyance is such that if the said J. M. Scott, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said The Cumberland Savings Bank Co., the sum of Eighteen Thousand Two Hundred Dollars, represented by various promissory notes of various dates and amounts and signed by said J. M. Scott, by Sarah R. Scott, and by both, then this conveyance shall be void; otherwise it shall be in full force.

It is further agreed that if default be made in the above conditions, or any part thereof, or if any secreting, or removal from their location, any abuse, or misuse, any sale, any seizure whatever by any process of law of said goods or chattels, or of any part of them, be either made or attempted by said mortgagor.., or by any person or persons claiming under ..... or in behalf of either, or by or in behalf of any creditor or creditors of said mortgagor.., or if from any other cause the security shall become inadequate, then said mortgagee.. or successors may take immediate possession of said property, or of any part thereof, wherever found, and sell same at public or private sale, for the highest price ..... can obtain, and pay indebtedness and expenses. And it is further agreed that said mortgagee.. or successors may insure said property for ..... benefit, during the continuance of this mortgage, and at the expense of said mortgagor.., the cost of said insurance to be secured by this mortgage; and further, that in default of payment of said money, or any part thereof, then said mortgagee.. or successors may sell said property at public or private sale, for the highest price ..... can obtain, and shall apply the proceeds of said sale to the payment of said indebtedness and interest thereon, and of all reasonable and necessary costs, including the cost of filing, recording and refiling this mortgage, and said costs of insurance, and shall pay the residue, if any, to said mort-

Stipulation.

gagor, . or successors. Otherwise said property is to be and remain in the peaceable possession of said mortgagor . . or legal representatives.

And the said mortgagor hereby covenants and agrees to, and with said mortgagee, his executors, administrators and assigns, that he is the true and lawful owner of the above described property, and has good right to sell, convey and incumber the same; and that the same is free from all incumbrances whatsoever.

In Witness Whereof, the said J. M. Scott and Sarah R. Scott, his wife have hereunto set their hands this 19 day of June A. D. 1926.

J. M. Scott
Sarah R. Scott.

Hazel Scott
L. A. Claypool

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

STIPULATION—Filed September 22, 1928.

The proposed bill of exceptions in the above entitled actions which by order of the Court were consolidated for the purpose of trial and tried in one trial having been duly presented by counsel for defendants and the same having been examined and allowed by counsel of both parties hereto by agreement, it is therefore stipulated and agreed that the foregoing Bill of Exceptions is correct and that it contains all the evidence offered and received and a correct reference to all the exhibits introduced and true and correct copies of the same and of all the proceedings had on trial of said cause.

It is further stipulated that this Bill of Exceptions as engrossed be settled, allowed, and signed by Honorable Benson W. Hough, Judge of said Court, in accordance herewith.

It is further stipulated and agreed between all parties to each of the above entitled causes that Plaintiff's Ex-

Notice of Appeal.

hibit 6, which consists of cinders of burned wool, because of the impossibility of printing same, need not be printed as a part of the record in any of the above entitled causes but that the said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party.

F. S. Monnett,
Attorney for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendants.

NOTICE OF APPEAL—Filed September 22, 1928.

Sun Insurance Office, the defendant, hereby gives notice to the plaintiff, J. M. Scott, that it appeals from the judgment entered in this cause.

Mooney, Bibbee & Edmonds,
Its Attorneys.

Waiver.

J. M. Scott, the plaintiff herein, hereby acknowledges Service upon him of the foregoing written notice of appeal, waives the issuance or service upon him, of any further notice of appeal or citation, and enters his general appearance herein for all purposes of appeal. Bond demanded. No waiver as to time or form of Bill of Exceptions.

J. M. Scott.
F. S. Monnett,
Of Counsel, His Attorney.

PETITION FOR APPEAL—Filed September 22, 1928.

To the Hon. Benson W. Hough, Judge, of the United States District Court, for the Southern District of Ohio, Eastern Division, Aforesaid:

Now comes the Sun Insurance Office, defendant herein, by its attorneys, and respectfully shows that on the 15th day of June, 1928, the jury duly impaneled, by direction of the Court, found a verdict against your petitioner and in favor of the above named plaintiff and upon said verdict a final judgment was entered by this court in favor of the plaintiff on the 7th day of August, 1928, against your petitioner, the defendant herein, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of error which is filed with this petition.

Your petitioner, the defendant herein, further respectfully says and shows that this is an action for recovery upon a policy of fire insurance issued by the defendant, your petitioner, to the plaintiff, J. M. Scott; and that this is an action in which a direct review of the decision of the United States District Court may not be had in the Supreme Court of the United States under Section 238 of the United States Judicial Code, or Title 28, Section 345, United States Code Annotated, as amended by the act of February 13th, 1925; that this case is one in which, under the legislation (Section 128 of the United States Judicial Code or Title 28 Section 225 of the United States Code Annotated of 1928) in force when the act of January 31st, 1928 was passed, a review could be had in the United States Circuit Court of Appeals, Sixth Circuit, on writ of error to said judgment of the United States District Court.

Your petitioner feeling itself aggrieved by the aforesaid verdict and judgment entered thereon as aforesaid, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit and prays for reversal of said judgment and hereby petitions the court for an order allowing it to prosecute an appeal to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided for the correction of errors so complained of and herewith assigned, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals and that an order may be made fixing the amount of security to be given upon said

Assignment of Errors.

appeal by your petitioner, the defendant herein, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings and the execution of the judgment may be suspended, superseded and stayed and that a supersedeas be issued until the determination of said appeal by said United States Circuit Court of Appeals for the Sixth Circuit.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Petition for Appeal.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed September 22, 1928.

Now comes the defendant in the above entitled case, Sun Insurance Office, in connection with its petition for appeal, and makes and files the following assignment of errors which it avers occurred upon the trial of this action and upon which it will rely in the prosecution of its appeal to reverse the judgment of this honorable court:

1. The Court erred in entering judgment in favor of the plaintiff and against the defendant for the sum of Six Thousand Four Hundred and Twelve dollars and fifty cents ($6412.50) and costs, or any other sum.

2. The court erred in its order overruling the defendant's motion for a new trial, and in each ground thereof, to which order the defendant then and there excepted.

3. The court erred in its order overruling the defend-

ant's motion at the close of plaintiff's case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

4. The court erred in its order overruling the defendant's motion at the close of all of the evidence submitted in the case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

5. The court erred in overruling the motion made by the defendant at the conclusion of the statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the statement of the case by plaintiff's counsel upon the ground that upon the statement of the case by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

6. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel, separately and combined with the original statement, the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

7. That the verdict of the jury and the decision and judgment of the court are contrary to the law and the evidence.

8. That the verdict of the jury and the decision and judgment of the court are manifestly against the weight of the evidence.

9. That the verdict of the jury and the decision and judgment of the court are not sustained by sufficient evidence or by any evidence submitted in the case.

10. There was error and abuse of discretion in the order of the court in consolidating this action for trial with four other actions pending in this court, to which the defendant at the time objected and excepted.

11. The court erred in directing the jury to return a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

12. The court erred in not submitting to the jury the issue as to the amount of the loss, to which the defendant at the time excepted.

13. The court erred in admitting in evidence and refusing to rule out on defendant's motion testimony of

the plaintiff to the effect that the premium paid by the plaintiff for the policy in suit had not been tendered back by the defendant to the plaintiff before or after this suit, to each of which rulings the defendant at the time excepted, including the following testimony:

"Q. I will ask you whether any of these premiums have ever been tendered back to you either before or after this suit?

Mr. Edmonds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant; the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes, I thought you had answered?

A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted."

14. The court erred in admitting in evidence testimony of the plaintiff that the defendant or its agents did not cancel or tender back anything to cancel a former policy issued by the agent, to which ruling the defendant at the time excepted, including the following testimony:

"Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of, which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court: Objection overruled; exceptions noted.

The Witness: He did not."

15. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, to which ruling the defendant then excepted, testimony of the plaintiff to the effect that the soliciting agent who countersigned the policy in suit knew that the plaintiff was giving, or had given, a chattel mortgage on a part of the wool described in the policy, including the following testimony:

"Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable

clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that the evidence proposed to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an incumbrance by chattel mortgage, the entire policy shall be void, whereas, the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court.

The defendant's exceptions may be noted.

(Question read.)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I borrowed from them. Now, let me just—

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said, 'If you do, I will go to the office'. He had company at home; his office was in the First National Bank of our town. I said, 'No, it isn't necessary, you can write it

out Monday morning and mail it, so I will get it through the mail; I am away from home during the week, and I will send you a check for the money", which he did.

Mr. Edmonds: Motion to rule out the answer and each part thereof, on the ground that it is a violation of the parol evidence rule.

The Court: You don't have to restate these reasons, we haven't time to listen to any dissertation upon it each time. Your motion to exclude the answer is overruled and your exceptions are noted, for the reasons announced in the objection to the question.

Q. I will ask you the same question, as to what, if anything was said to I. E. Stottsberry, the agent's name appearing at the bottom of the policy, Exhibit No. 3, Westchester Fire Insurance Company, as to there being any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this question as the former, and the same reasons announced, and the court overrules the objection and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy, which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Monnett, possibly the conversation took place on Saturday, and I expect that policy will be dated on Monday, I remember very well I went down to his home, it was on Saturday evening.

Q. Had that lien existed on there up as early as the other policy, April 1, 1926? A. No, sir."

and including the following testimony of J. M. Bracken:

"Q. Do you recall of Mr. Scott giving a chattel mortgage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage?

Mr. Edmonds: He asks, do you recall of Mr. Scott

giving a chattel mortgage and we object, first, upon the ground, that the evidence disclosed a fact already known which, in no event, would impute knowledge to this company. Second, evidence tending to show knowledge to the agent is a violation of the parol evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exceptions by each of the defendants."

16. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, the testimony of the plaintiff as to conversation between plaintiff and A. C. Harrod—who signed the non-waiver agreement on behalf of the insurance companies, including defendant—after the non-waiver agreement was signed and as to the examination of the premises made after the fire by said Harrod and as to the requests and demands claimed to have been made by A. C. Harrod of the plaintiff that the plaintiff obtain a list of the farmers from whom the plaintiff claimed to have purchased the wool which the plaintiff claimed was damaged by the fire in question; and as to the claimed statement of Harrod that he would come back and check up with the plaintiff some time and that nothing further would be required of the plaintiff and that there would be no trouble; and that they would have a settlement and that in the meantime plaintiff would get a form such as was usually sent out but that the plaintiff should pay no attention to that; and that the plaintiff should go right ahead and gather up this wool; and the testimony that he procured the data claimed to have been requested by said Harrod; and the testimony that said Harrod did not call for any statement prepared by the plaintiff, including the following testimony:

"Q. State what was said by this adjuster, between you further, as to the fire, give it in order the best you can from start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and fixing the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of

the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: Insofar as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted."

and including the following testimony:

"Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that these parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can have your exceptions.

Q. What requirement did he then make of you. A. He asked me, he said, 'Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them'. I says, 'I will do the best I can', I says, 'I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment'. I had bought before this and shipped several carloads the same season. He said, 'You can remember'. I says, 'It is a pretty big thing', I says—I told him I would do the best I could.

"Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the

best I could and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

"You may state to the jury— A. I haven't told you all. Q. Go ahead? A. Then he says, 'Well, Scott, I wouldn't know any way to say but the one, you have to'. He says, 'It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss'. 'Well', I says, 'I recognize that fact, but,' I says, 'Wouldn't my oath amount to something in its'? He said the oath wouldn't do. I says, 'I will still say what I said prior to this, I will do the best I can'. I says, 'I don't know how soon I can do it; we will go right at it. I will go and see my son and go at it'. I says, 'The roads are in such a condition, we can't travel by automobile'.

"Q. Unimproved roads?

"A. Yes, unimproved roads. He says, 'that is about all that can be done until you get proof of loss, and I will come back and check up with you sometime'. I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, 'Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me'. and he says 'No'. He says, 'You get that gathered up, Scott, and there will be no trouble; we will have a settlement'. He says, 'In the meantime you will get a form like that we usually send out, but you pay to attention to that, you go right ahead and gather up this wool'. I says, 'I will do it'.

Motion by counsel for defendants to strike out each and every part of the answer on the same ground.

The Court: Same ruling and same exception."

and included the following testimony:

"Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the ground heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exceptions noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

Order Allowing Appeal.

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said awhile ago, through mud roads where he could not go by automobile."

17. The verdict of the jury and the finding and judgment of the Court and each of them was excessive.

18. And for other errors apparent upon the face of the record.

Wherefore, the defendant prays that said judgment of the District Court of the United States for the Southern District of Ohio, Eastern Division, in favor of plaintiff and against the defendant, be reversed and that said Circuit Court of Appeals render judgment in favor of this appellant which said district court should have rendered or that said District Court be directed to grant a new trial of said cause.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Assignment of Errors.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ORDER ALLOWING APPEAL—Filed September 22, 1928.

This day came the defendant, Sun Insurance Office, by its attorneys, and filed herein, and presented to the court, its assignments of error, and petition for allowance of an appeal intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered,

duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court in open court does allow the appeal, upon the defendant giving bond according to law in the sum of $6700.00 to the approval of this court, which shall operate as a supersedeas bond.

Hough, J.

BOND ON APPEAL—Filed September 22, 1928.

Know All Men By These Presents: that we, Sun Insurance Office, as principal, and the Great American Indemnity Insurance Company of New York, as surety, are held and firmly bound unto J. M. Scott in the full and just sum of Six Thousand Seven Hundred Dollars ($6,700) to be paid to the said J. M. Scott, his attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of September, 1928.

Whereas lately, at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit pending in said Court between J. M. Scott as plaintiff and Sun Insurance Office, as defendant, a judgment was rendered against the said Sun Insurance Office, and the said Sun Insurance Office, having obtained an order allowing appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the plaintiff citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 22nd day of October, next.

Now the condition of the above obligation is such that

if the said Sun Insurance Office, shall prosecute its said appeal proceeding to effect, and answer for all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force, virtue and effect.

Sun Insurance Office.
By R. M. Edmonds,
Attorney for Principal, Sun Insurance Office.
Great American Indemnity Company of New York.
By Frank J. Macklin,
Attorney in Fact.

Sealed and delivered in the presence of:
B. M. Ryan,
Bertha Hathaway.

Approved by:
Hough, United States District Judge.

Acknowledgment of Service.

We hereby [illegible] service up[illegible] this 22nd day of September, 1928, of copy of the above Bond on Appeal.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.

CITATION—Filed September 22, 1928.

United States Circuit Court of Appeals, for the Sixth Circuit.—Calvin Coolidge, President of the United States of America, ss:—To J. M. Scott, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the 22nd day of October, next,—within 30 days from the date hereof—pursuant to a petition for appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein Sun Insurance Office is appellant and you are appellee to show cause, if any there be, why the judgment rendered against the said appellant as in

the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 22nd day of September, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the United States of America the one hundred and fifty-second.

Hough,
Judge of the District Court.

Service of the above Citation is hereby acknowledged and appearance of appellee is hereby entered.

F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for Plaintiff.

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

STIPULATION—Filed September 22, 1928.

It is stipulated by and between each and all of the parties to the above entitled cases and their attorneys that a single narrative form bill of exceptions under the captions of all of the above entitled cases may be filed, settled, allowed, signed and used for all purposes as and for the narrative form bill of exceptions in each of the above entitled cases as fully as if separate narrative form bills of exceptions were filed in the several cases.

J. M. Scott, Plaintiff,
By F. S. Monnett,
Attorney for Plaintiff,
The Home Insurance Company,
New York Underwriters Insurance Company,
Westchester Fire Insurance Company,
Sun Insurance Office,
Norwich Union Fire Ins. Society,
By Mooney, Bibbee & Edmonds,
Attorneys for each Defendant.

STIPULATION—Filed September 22, 1928.

In the above entitled cause it is stipulated that the printed record may be, by the Clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon appeal in said cause.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Dated this 21 day of September, 1928.

PRECIPE FOR TRANSCRIPT—Filed September 22, 1928.

To the Clerk:

The clerk of this court is hereby instructed by the defendant in the foregoing entitled cause to make up transcript of the record of said cause in said court for transmission upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and in making up the same to include therein the following pleadings, documents and exhibits, being all of the record in said cause, except summons, subpoenas and returns thereon, and motion directed to said petition and rulings thereon, to wit:

1. Transcript of record of Common Pleas Court of Guernsey County, Ohio, with pleadings and petition, bond and order for removal filed therein and the full transcript on removal.
2. Amended Petition.
3. Second Amended Petition.
4. Answer to Amended Petition.
5. Answer to Second Amended Petition.
6. Reply to Answer to Second Amended Petition.
7 and 8. Orders showing order of consolidation and impaneling and swearing of jury and trial in progress.
9. Verdict for plaintiff.

10. Defendant's motion for a new trial.
11. Entry overruling motion for a new trial and entering judgment.
12. Order extending time for filing bill of exceptions.
13. Bill of Exceptions, Narrative form statement of the evidence as approved by the Court.
14. Notice of appeal and acknowledgment of Service.
15. Petition for appeal.
16. Assignment of errors.
17. Order allowing appeal.
18. Bond on Appeal.
19. Citation and acknowledgment of service thereof.
20. All stipulations of counsel filed herein.
21. Precipe for transcript.
22. Clerk's certificate to judgment roll.
23. Clerk's certificate to transcript of record.
24. All other pleadings, proceedings, papers, orders, records, and minutes which are or may become part of the record in this cause with the exception of those papers hereinbefore expressly stipulated as though to be excluded.

The foregoing transcript shall be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

Please deliver all papers to Toothaker & Rodenfels, printers, Columbus, Ohio.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

Service of copy of the foregoing directions to the Clerk for making up transcript of record on appeal in said cause is hereby acknowledged this 22nd day of September, 1928.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, Harry F. Rabe, clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Columbus, Ohio, this.....day of.....1928.

.....

Clerk.

By.....,

Deputy.

JOURNAL ENTRY—Filed October 15, 1928.

It being made to appear to the court that under stipulation between counsel in the record, Plaintiff's Exhibit 6, which consists of cinders of burned wool, because of the impossibility of printing the same, need not be printed as a part of the record in the above entitled cause, but that said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party, it is considered and ordered upon request of Appellant that said original Exhibit 6 be returned and transmitted by the clerk of this court with the transcript of the record in this court to the clerk of the United States Circuit Court of Appeals.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 20, 1928)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

MOONEY, BIBBEE & EDMONDS,
First National Bank Bldg.,
Columbus, Ohio.

CAUSE ARGUED IN PART

(December 4, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are argued in part by Rolland M. Edmonds for Appellants and by F. S. Monnett for Appellee and are continued until tomorrow for further argument.

CAUSE FURTHER ARGUED AND SUBMITTED

(December 5, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are further argued by R. M. Edmonds for Appellants and by Elwood Murphy and F. S. Monnett for Appellee and are submitted to the Court.

JUDGMENT

(Filed December 12, 1930)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the District Court remitting the interest from the date of the fire until December 4th, 1926; otherwise, the judgment will be reversed.

OPINION

(Filed December 12, 1930)

Before MOORMAN and HICKENLOOPER, Circuit Judges, and KILLITS, District Judge.

MOORMAN, Circuit Judge: These suits were brought in the state court and were removed by the several defendants to the federal court, where they were consolidated. Each of them sought a recovery upon a policy of fire insurance issued upon wool including woolen bags belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of in-

surance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." This latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was shown by the proofs that on June 19, 1926, the plaintiff executed a mortgage on the property to the Cumberland Savings Bank Co., and that this mortgage was subsisting with the principal unreduced at the time of the fire. It further appeared though that the mortgage had not been verified nor deposited for record as required by the Ohio Statutes. Upon this latter evidence the court concluded that it was not a mortgage but was only a collateral contract and, being of opinion also that no other valid defense was made out, directed verdicts for plaintiff for the full amount of the policies with interest.

The statutes of Ohio provide: Section 8650, a mortgage of chattels "which is not accompanied by an immediate delivery * * * shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section"; Section 8561, such a mortgage "must be deposited with the county recorder of the county where the mortgagor resides"; and Section 8564, "the mortgagee, * * * before the instrument is filed, must state thereon, under oath, the amount of the claim, and that it is just and unpaid." We do not find from the language of these statutes that the failure of the mortgagee to comply with them vitiates the mortgage as between him and the maker. It has been ruled that it does not by the courts of Ohio. *Hutchins* v. *The Cleveland*

Mutual Ins. Co., 11 O. S. 477; *Francisco, et al.* v. *Ryan*, 54 O. S. 307; *Boyer* v. *Knowlton Co.*, 85 O. S. 104; *York* v. *Cassel*, 201 U. S. 344. Hence upon this point we think the court was wrong and that it must be held that the mortgage was an encumbrance within the meaning of the policy provisions relied upon.

Three of the policies, those issued by the Sun Insurance Office, the Norwich Union Fire Insurance Society, and the Home Insurance Company, carried riders providing that any loss occurring under the policies that might be proved to be due the assured should "be payable to the assured and Cumberland Savings Bank Company, subject, nevertheless, to all the terms and conditions of the policy." Two of them, those issued by the New York Underwriters Company and the Westchester Fire Insurance Company, carried no such clause. It is claimed by plaintiff, as to these latter policies, that Stottsberry, the local agent who wrote them, was informed or knew of the mortgage, and hence, under *Foster* v. *Scottish Union & National Insurance Co.*, 101 O. S. 180, and *Hartford Fire Ins. Co.* v. *Glass*, 117 O. S. 145, these were waivers of the policy provisions prohibiting the encumbering of the property. There are two objections to this contention: The first is, the question is not controlled by Ohio law but is one of general jurisprudence, *Hartford Company* v. *Nance*, 12 Fed. (2d) 575 (6 C.C.A.); the other, the contracts of insurance specifically provide that a waiver may be made only in a designated way, and there was no attempt to effect waivers in that way in these cases. We held in both the Nance case and *Hartford Co.* v. *Jones*, 15 Fed. (2d) 1 (6 C.C.A.), that such provisions were binding upon the parties to the contract, and that where the policy contained such a provision, knowledge of the local agent of the forbidden condition did not effect a waiver of the policy provision. There is in our opinion no escape from the application of those cases to the two policies here in question.

Nor did the defendants' failure to tender a return of the premiums that were paid on the policies operate to estop them from urging the effectiveness of the policy provisions. *United States Life Insurance Co.* v. *Smith*, 92 Fed. 502 (6 C.C.A.); *Georgia Home Insurance Co.* v.

Rosenfield, 95 Fed. 358 (6 C.C.A.); *Kentucky, etc., M. Co.* v. *Norwich Union Fire Insurance Society*, 146 Fed. 695. Neither did the action of the adjuster, immediately after the fire, in investigating the loss, amount to a waiver of the breach of those provisions. The evidence shows that plaintiff granted the adjuster permission to make a full investigation, and agreed that such action as he might take in that respect would not constitute a waiver nor invalidate any of the conditions of the policies. It was under this agreement and with the full consent of plaintiff that the adjuster acted. Plaintiff was nowhere misled or prejudiced by his investigation, and certainly it ought not to result in a waiver of a provision with which it had no legal connection. We hold that it did not and also, that the trial court should have directed verdicts for the New York Underwriters and the Westchester Fire Insurance Companies. Whether there are grounds for and the plaintiff may yet seek reformation of the policies issued by those companies are matters not presented on this record. See reference to Northern Assurance Co. case in *Forkner* v. *Twin City Fire Ins. Co.*, 19 Fed. (2d) 419 (6 C.C.A.).

As to the policies with riders providing that any loss occurring under the policies should be payable to the assured and the Cumberland Savings Bank Company, the question is different. In two decisions by this court —*Commercial Union Fire Insurance Co.* v. *Marshall, etc.*, 18 Fed., (2d) 457, and *Firemen's Insurance Co.* v. *Brooks*, 32 Fed. (2d) 451—it has been held that such a rider is tantamount to an indorsement in accordance with the provisions of the policy permitting an encumbrance of the property. It is true that the policies in those cases provided for payment of the loss as "interest may appear"; but under the circumstances we do not think a legal distinction can be founded upon the absence of that phrase from these policies. Nor is *Bates* v. *Equitable Insurance Company*, 10 Wall. 33, inconsistent with that conclusion. In that case there was no evidence "outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured," and hence the question became determinable upon implications arising from the

indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, "the case might be different." In the case at bar the riders appear to have been affixed to the policies by an agent of the company who was also an officer of the mortgagee bank. These riders were in the form and were attached in the manner provided for in the policies, and it is to be presumed, nothing to the contrary appearing, that the agent attaching them acted with full authority. The purpose in attaching them was to grant authority to encumber the property. The language used was that of the insurance companies and was sufficiently comprehensive for the purpose for which it was intended. The reasoning of Judge Hook in the dissenting opinion in the *Atlas Reduction Company* case, 138 Fed. 509, is therefore directly applicable. In the Brooks case, supra, this court chose to follow and apply that reasoning rather than that of the majority opinion. And it was stated in the Brooks case that "if there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is at least not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." In this case it clearly appears that the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage. They are sufficiently comprehensive, as we have said, for that purpose, and being so intended, they seem to us to be quite as effective as they would have been had they contained the further phrase "as interest may appear."

Complaint is made of the court's ruling in consolidating the cases and hearing them together. We think that action was proper. The main question in each case was

that of liability, and each case was decided upon its own facts. There is no showing anywhere in the record that any one of the defendants was prejudiced by the trial of its case with the others. Nor in our opinion was it error to permit plaintiff to proceed with the trial without making the mortgagee bank a party plaintiff. The insurance companies agreed in case of loss to pay the money to the insured and the bank. They could have made the bank a party to the proceedings if they had wanted to. They preferred, apparently, not to do so but to litigate the claim with the party to whom the primary liability was due. After doing this they cannot be permitted to say that the judgment should be reversed because the bank was not a party. Furthermore, there is yet time for them to obtain any protection that they may be entitled to as against the bank, for when the case is remanded, the court below will see to it, no doubt, that the money is paid into court to be held until the rights therein as between the plaintiff and the bank are determined.

The remaining defense relates to arbitration. The policies provided, in the event of disagreement as to the amount of the loss, the same should be ascertained by arbitration, the insurance companies and the insured each to select an arbitrator, and the two so chosen to select an umpire. They further provided that no suit or action on the policies for the recovery of any claim should be maintained in any court of law or equity until there had been full compliance by the insured with all the terms and requirements of the policies. There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained.

It results from the foregoing that the lower court was right in directing verdicts against the Sun Insurance Office, the Norwich Union Fire Insurance Society and the Home Insurance Company. The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed. For the reasons hereinbefore stated the judgments against the New York Underwriters Company and the Westchester Fire Insurance Company are reversed.

KILLITS, District Judge, dissenting:

In *United States Fidelity and Guaranty Co.* v. *Guenther*, 31 Fed. (2d) 919, 920, this Court cited *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 463, to the effect that the contract provisions involved in the case then before it are manifestly "to be construed according to the sense and meaning used, and, if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense." In that connection *Thompson* v. *Phoenix Insurance Co.*, 136 U. S. 287, 297, was also cited to the point that if the policy "is so drawn as to require interpretation and to be fairly susceptible to two different constructions, the one will be adopted that is most favorable to the insured."

The [illegible] citations were the premise to a comment that "resort cannot be had to this latter rule to nullify the plain and obvious provisions of an insurance policy. * * * But the question remains whether the language used is in fact susceptible to a double meaning, or, otherwise expressed, whether it will fairly and reasonably support that construction upon which liability of the insurer may be sustained."

Sanborn, Judge, in *Insurance Co.* v. *McNulty*, 157 Fed. (C.C.A.) 224, 226, referring to the second rule above quoted said: "But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured."

The dissent, which, regretfully, I feel impelled to offer to the majority opinion respecting the three cases considered involving, respectively, the policies issued by the Norwich Union, Sun and Home Insurance Companies, is founded altogether on what seems to me to be the right application to the facts of each of these cases of the principles above stated. I would make but one supplement, the propriety of which seems to me to be above question, that, when the consideration is of a rider or indorsement upon a policy of insurance, offered as a waiver of a plain provision of the contract, which waiver, as provided in another contract provision, can be effective only when it meets the plain terms of such a permitting provision, such attempts to waive must also come for interpretation as to effect under the same rules of construction as the contract itself.

In *Atlas Reduction Co.* v. *New Zealand Insurance Co.*, 138 Fed. (C.C.A.) 497, the precise question was present which, in the instant cases, is fundamental to the division in this Court, i. e., the effect of a rider upon the policy, offered as a waiver of a defeasance provision exactly in the terms of provisions of that character in the contracts before this Court. The parallel is completed in the fact that also the terms of a clause in the contract there specifying how, only, a waiver could be effected, are *ipsissimis verbis* of similar provisions in the present contracts.

In the majority opinion in the Atlas case, by Vandevanter, Judge, the following from *Fire Insurance Company* v. *Coos County, supra,* equally pertinent to the instant cases, is quoted:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other;

and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue to terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

This majority opinion proceeds to state the controlling question in that case as follows:

"What, in view of the plain and unambiguous stipulations in the policy, is the meaning and interpretation of this loss payable indorsement. Obviously, the words used therein must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision or condition thereof waived, only by a writing of equal dignity and credit with the policy itself."

Then followed a pertinent quotation from *Northern Assurance Co.* v. *Grandview Building Co.*, 183 U. S. 308, 364, a decision the importance of which to a consideration of the instant situation should not be overlooked.

The point now involved can be no more clearly stated than in the language of the foregoing from the Atlas majority opinion. It is true that this Court, in decisions referred to later herein, has favored Judge Hook's dissent in that case, but, as we read the divergent opinions, the division there was a difference of judgment whether the waiver rider peculiar to that case, was reasonably in conformity to the terms of the contract by compliance with which, only, a waiver could be effective.

It is convenient here to re-state the pertinent language of the several policies involved in this discussion providing for avoidance of the contracts and for the manner in

which, only, right to avoid by the insurer may be waived. The policies differ but in the placing of the paragraph which is numbered one, below. In the Home and Norwich Union policies it is on the face of the contracts, preceding the stipulations we number herein two and three, whereas in the Sun instrument, it follows two and three, but, in each instance, it is addressed to the same stipulations. The quotation is from the Home policy, and the italics are mine.

1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the *subject of agreement* endorsed hereon or added hereto, and as to such provisions and conditions *no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver,* if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured *unless so written or attached.*

2. This entire policy, unless otherwise provided *by agreement* indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; * * *.

3. If, with the *consent* of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

My view is, that to be effective, the indorsement or rider, claimed to work a waiver, as provided in the stipulation numbered one, above, must be so worded that the

acceptance of it by the insurer should be regarded as an *agreement* to continue the contract in spite of the otherwise avoiding presence of a mortgage lien; i. e., that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgagee.

In *Assurance Company v. Grandview Building Association, supra,* it was held—183 U. S., 361, that the

"limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture,* dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts,* ratified the action of the agent." (Italics mine.)

The sweeping effect of this decision and its continued unabated authority, applicable to the instant situations, is not open to question—recognized frequently and recently by this Court in unison with all other federal tribunals.

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

In the Atlas case the rider waiver, whose sufficiency was questioned, was: "Subject to all of the conditions of this policy, loss, if any, payable to D. & S. *as their interest may appear.*" The majority holding was that this language did not "in terms or by implication consent to the incumbrance created by the chattel mortgage." Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase "as interest may appear"

was used in such cases to refer to a chattel mortgage interest. This Court, in *Commercial Union Insurance Company* v. *Marshall,* 18 Fed. (2d) 457, 458, 459, where the rider was: "any loss * * * proven to be due to the insured on this policy shall be held payable to D. *"as interest may appear"*, indicated its preference for Judge Hook's reasoning and conclusion, but found that it "expressly appeared," in the record before it, "that according to the usages and practices of the community and of these insurance companies, this phrase 'as interest may appear' was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest." It was also held, independently of Judge Hook's view in the Atlas case, that "the stipulation that the loss should be payable to Dacus 'as interest may appear' * * * applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter."

In *Firemen's Insurance Company* v. *Brooks,* also by this Court, 32 Fed. (2d) 451, the rider was, page 451, "Any loss * * * shall be payable to Thomas Trimby, *as interest may appear,* subject, nevertheless, etc." In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be aplpicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit."

In the Sun and Norwich Union cases the waiver rider was attached nearly a week after the chattel mortgage had been given, and nearly two weeks after the policies had issued. In the Home case that was done contemporaneously with the issuance of the policy. Upon this

phase, this Court in the Brooks case observed, page 452, 18 Fed., 2nd,

"One distinction may be suggested, inherent in the facts of the Atlas Case. The loss payable clause was there added after the policy had been some time in force. There was a distinctly greater possibility that the insured might be using the policy as security in some way disconnected from the property, so that "interest" might mean interest in the proceeds only rather than interest in the property, than there could be in a case where the clause is simultaneous with the policy,—for the loss payable clause is the customary means of protecting a then existing interest in the property."

The foregoing concerning Judge Hook's position in the Atlas case, and the view of this Court in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase "as interest may appear" in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof. These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that when that is done the insurer is called upon only to consider whether in case of loss it will honor such an appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq., 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See, also, the Bates case, *infra*. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity

exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties, while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent "where plain and unequivocal language is employed."

I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the "as interest may appear" decisions, for that important phrase is entirely absent. Its wording is: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

Secondly, there is not the [illegible]ntest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is "in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest", i. e., chattel mortgage interest.

In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted

stipulations which the majority considers it to qualify—these three factors and, absolutely, nothing else.

The majority apparently does not agree with this and I therefore hesitatingly proceed to take issue with certain fact statements in the majority opinion. Therein it is said of the riders: "The purpose of attaching them was to grant authority to encumber the property by chattel mortgage." Aside from the fact that there was a mortgage, I can not find anything on the record to support that statement. All that catches my attention is that, without comment, the riders were offered and received as attachments to the several policies and that Bracken, the issuing agent, said this and nothing more: "At that time I attached the loss payable clause to those policies as agent for the companies." Even this language is ambiguous as to time and supports an incorrect inference, for the Sun and Norwich Union policies were issued June 14, the mortgage executed June 19, and the riders attached June 24, while the Home policy issued July 6 bearing the rider attached as of that date. Hereafter will be discussed the equivocal position of Bracken which deserves consideration when is sought to be decided the capacity in which he attached the riders.

Nor am I able to find in the record any testimony or proof supporting this in the majority opinion: "The language (of the riders) used was that of the insurance companies." This Court, in Marshall's case (18 Fed., 2nd, 457, 459), apparently entertained no criticism of Judge Hook's notice of customs (138 Fed., 514). If we may follow that precedent and consider, as Judge Hook said, "as a matter of common knowledge" what, "among those having to do with fire insurance either as agent of insurers or as insured," was the form of a loss payable clause, adopted by companies doing fire insurance business in Ohio, as the uniform standard for Ohio, used for years before, and in 1926, and ever since to this time, it would be found to include this pregnant phrase, which Bracken did not employ even by implication: "As their (the payees') respective interests may appear."

The majority opinion invites attention to the "circumstances" of the instant cases, under which it is of the opinion that no "legal distinction (between Judge Hook's

opinion and those in the Marshall and Brooks cases) can be founded upon the absence of that additional phrase (as interest may appear) from these policies." There are, indeed, unusual circumstances shown exclusively upon the records before us, but these, so far from diminishing the importance of the absence of the critical phrase, in my judgment emphasizes the necessity of using it if the rider was to operate as a waiver of the lien inhibition.

First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued. Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market. His proof of loss admits that this property cost him in 1925 $34,800 and that its value at the time of the fire was but $28,700, a shrinkage in value of seventeen and one-half per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926, or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200, "represented (language of chattel mortgage) by various promissory notes of various dates and amounts," signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8,000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,500, was at the same time cashier of the chattel mortgagee bank. August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy. August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again

bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved "several times to see Mr. Scott (the insured) on business." The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

I draw no inferences from these facts save, 1. That Scott was in losing and involved circumstances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used.

Crass stupidity may explain why Bracken failed to protect his bank against Scott's creditors and used a defective rider, but a more reasonable explanation, considering that he had been chosen to hold two responsible positions, is that he had some purpose to serve thereby, for these omissions are correlated. However, the circumstances noted do not appear to me to have the effect, suggested by the majority, to render of no consequence the absence of the customary "interest" phrase.

One matter does however so stand athwart the situation as to greatly weaken the plaintiff's case by destroying one inference which otherwise might be helpful and

that is Bracken's duality of representative obligations when he acted in attaching the riders. These were then incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and, correspondingly to the disadvantage of his insurance principals. This incompatible duality makes it impossible to attribute to the insurers any act of his which favored either the bank or the insured through the bank. *Mulrooney* v. *Royal Insurance Company,* 163 Fed., 833, 835, 9 C.C.A.; *Arispe Mercantile Company,* v. *Capitol Insurance Company,* 133 Iowa, 272, s. c., 9 L. R. A., N. S., 1034, and annotations; *American Surety Company* v. *Pauly,* 170 U. S. 133; *Aetna Indemnity Company* v. *Schroeder,* 12 N. D. 116. Consequently it may not be charged against the insurers that they, through their agent, produced and attached the riders. We have, therefore, as I look at it, nothing in this record to serve our judgment of the effect of the riders, save the inhibiting stipulations of the contracts, the provisions for waiving those stipulations and the wording of the alleged waiver.

It is difficult for me to see how any support for the majority position is found in the three "as interest may appear" cases. I do not entertain any question whatever but that our Marshall and Brooks cases were rightfully decided. But to go beyond them, and to ignore, while still using them, the critical fact upon which each depended, is, I think, without justification. When they are eliminated from the majority opinion it seems to be entirely without precedent, unless it be the Bates case soon to be discussed.

As I construe the language of this rider it tends to rebut an impression that the Bank held an interest in the insured property, of whatever sort, because if its right to participation in a recovery in consequence of such interest existed at all, the measure of that recovery would be the extent of the interest—here the direction is that damages *"due the assured"* are to be "payable to the assured" *and,* the Bank, divided on apparently equal terms between them. There is nothing which, once the direction is accepted by the insurer, requires the latter to go behind its terms to see that the extent of the Bank's

interest in recovery is exactly protected—it casts upon the insurer no duty of inquiry whatever.

The insurance practice, noted by Justice Miller in the Bates case, *infra,* and Judge Denison in the Marshal case, of appointing, as co-payee of a loss, one who has no interest in the subject of insurance, is a factor of interpretation in such cases as we have here—one upon which the issuing companies were entitled to rely, and which this Court should also consider. It is also noteworthy that the provision for a waiver of the defeasance clause says that the attached or indorsed waiver shall take the form of an "agreement" to waive. The question, therefore, is whether this rider achieves the dignity of an "agreement" to waive a very serious moral hazard, not referred to therein, and which the terms of the contract inhibit without a specific agreement.

I am unable to see the slightest ambiguity whatever in the language of the rider in these cases—it is just what it might well be to make the Bank a mere appointee in proceeds of recovery alone, with no suggestion that that appointment is based upon a subsisting interest in the corpus. Riders and indorsements of no less equivocal or ambiguous character than this have been before the courts to be interpreted to that result. One citation, still authoritative, which the majority cites, is sufficient for the present discussion. In *Bates* v. *Equitable Insurance Company,* 10 Wallace, 77 U. S. 33, where a policy contained the usual covenant that if the property were sold the insurance ceased unless the insurer consented in writing, it was held that an indorsement that the policy was "payable, in case of loss, to E. C. Bates" followed by the insurer's indorsement that "consent is hereby given to the above indorsement" did not imply either a knowledge or consent to a sale of the insured property. In this case the property had been sold to Bates, the appointee. In it, as here, there was, as noted by Mr. Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or of usage and custom which qualified the language used, wherefore the Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the Company, that any loss sustained by Philbrick, covered

by that policy, should be paid to Bates." As to this case the majority opinion says: "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which "the case might be different," wherefore, here, as in the Bates case, "the question becomes determinable upon implication arising from the indorsements (rider) alone."

My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that "resort cannot be had," in a case such as here, to the rule respecting resolution of ambiguities, because there is here no "double meaning" for that here the language used will not "fairly and reasonably support that construction upon which liability of the insurer may be sustained," and that our judgment should be, as in the Westchester and New York Underwriters cases, that the trial court should have directed verdicts for the defendants whose cases are herein considered.

The majority opinion savors, in my judgment, of a controversion of Judge Sanborn's injunction, *Insurance Company* v. *McNulty, supra,* that the rules as to ambigu-

ities cannot be permitted "to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the assured." Judge Hook, concluding his dissent in the Atlas case (page 516, 138 Fed.) says of the decision of the Supreme Court in the Northern Assurance case, *supra*, that by it "the tendency to the unrestrained invasion of the clear terms of policies of insurance by oral testimony which was so destructive of the rights of the companies has been well checked." It seems to me that the majority position tends to lower the bars to such invasion which the Supreme Court erected. The majority conclusions appears to me, also, inconsistent with the decisions of this court in the Nance and Jones cases, 12 Fed. 2nd 575, Syllabus 5, and 15 Fed. 2nd 1, Syllabus 3.

Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the matter of what knowledge the insurers had of the purpose of the riders that counts. They convey no hint of a chattel mortgage and there is not a scintilla of proof that the insurers knew anything about it whatever. As the language of the riders is without ambiguity, sufficient and reasonable to perform a far different office well known in insurance practice, it does not suffice to put the insurers on inquiry, even if the longest period, June 24 to September 5, may be considered a reasonable time for such inquiry by these particular companies.

There is no proof or even pleading that any one of the three companies knew of the mortgage, or had the slightest hint that the Bank was interested in the insured property in any way; nor is there proof or pleading that it was intended by this phraseology to convey such information to any insurer, or to have the rider work the

waiver of the defeasance clause of the contract. The insured, Scott, knew, by the character of the answer, that defense would be made that the rider was inadequate to serve the purpose for which the majority of this Court now holds it is sufficient. He had his opportunity, which is not yet lost, to reform the contract if he has proof with the essential qualifications which would make reformation possible at equity, wherefore there is no place here, *ex debito justiciae*, to relieve him, even if that were justifiable in these straight actions at law. Respectfully it is urged that courts, even Appellate Courts, should be slow, especially in cases at law, to relieve parties from the consequence of ineptitude or carelessness in presentation.

In my judgment the fact is not significant that in the Home case the issuing of the policy and the attachment of the rider were simultaneous, whereas in the other cases the rider was attached to an old policy.

As intimated I concur in the disposition by the majority of the Westchester and New York Underwriters cases. The Home, Sun and Norwich Union cases clearly seem to me to deserve the same findings and order.

CERTIFIED COPY OF REMITTITUR

(Filed December 20, 1930)

APPLICATION

Now comes the plaintiff, J. M. Scott, and asks leave of Court to file a remittitur of the excessive amount of judgment heretofore rendered in this Court, in the following cases, to-wit:

J. M. Scott v. *The Home Insurance Company of New York*, No. 2560.

J. M. Scott v. *Sun Insurance Company*, No. 2563.

J. M. Scott v. *Norwich Union Fire Insurance Society, Ltd.*, No. 2564.

On the ground that the United States Circuit Court of Appeals of the Sixth District, on the 12th day of December, 1930, affirmed the judgment of this Court in said respective cases; as to the excessive amount used the following language:

"The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed."

The remittiturs are hereto attached to this Application, under mark of Exhibit A, B, and C respectively, containing the amount of the excessive interest, as ordered remitted in said appellate decision.

(Signed) J. M. Scott, *Plaintiff*,
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

REMITTITUR

Be It Remembered that on the trial of this case before the United States District Court for the Southern District of Ohio, Eastern Division, on the 12th day of December, 1930, it appeared that there had been an excessive amount of interest computed in the verdict and judgment in case No. 2563 from the 6th day of September, 1926, to the 4th day of December, 1926, a period of ninety days amounting to the sum of $86.25.

And therefore, the said J. M. Scott, plaintiff herein, by F. S. Monnett, one of his attorneys, freely remits to the said Sun Insurance Office, defendant herein the sum of $86.25 interest in said sum of $5750.00, being interest computed for said ninety days.

(Signed) J. M. Scott, *Plaintiff,*
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

Application of J. M. Scott, plaintiff in the cases set forth in said application, has been made to this Court for leave to file his remittiturs in said cases on the grounds therein named. Granted.

It is ordered that the Clerk of this Court prepare certified copies of said remittiturs and forward same to the Clerk of the Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio.

(Signed) Hough, *Judge.*

A True Copy of the Original
Filed December 19, 1930.

Attest: Harry F. Rabe, Clerk
by James H. Clark, Deupty.

(Seal)

JUDGMENT ON REMITTITUR

(Filed January 6, 1931)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

The Court having filed its opinion and appellee, J. M. Scott, having thereupon filed in this court a certified copy of the remittitur entered in the court below, whereby it appears that said J. M. Scott consents to remit from the judgment theretofore rendered, the interest from the date of the fire until December 4, 1926.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, as so reduced, be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed February 10, 1931)

The petition for rehearing of this cause is hereby denied, Judge Killits dissenting.

MOTION TO STAY MANDATE

(Filed February 13, 1931)

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND THE JUDGES THEREOF:

Now comes Sun Insurance Office, the appellant in the above entitled cause, and shows to this Court that the appellant desires to and will, file with the United States Supreme Court a petition for a writ of certiorari from the United States Supreme Court in this cause, and that it is necessary in order to facilitate and make possible the filing of and to enable this appellant to file such petition for a writ of certiorari and to secure the granting of such writ of certiorari by the Supreme Court of the United States, that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and withheld until March 16, 1931.

Wherefore, appellant prays that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and with-held until March 16, 1931.

MOONEY, BIBBEE AND EDMONDS,
Attorneys for Sun Insurance Office, Appellant and Applicant.

Dated February 13, 1931.

ORDER STAYING MANDATE

(Filed February 13, 1931)

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date,—provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof or, if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Sun Insurance Office* v. *J. M. Scott,* No. 5278, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of February, A. D. 1931.

J. W. MENZIES
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

MAR 9 193
CHARLES ELMORE CRO
CLE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 28

SUN INSURANCE OFFICE, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROLLAND M. EDMONDS,
33 N. High St., Columbus, Ohio,
Counsel for Petitioner.

JAMES JOYCE,
Cambridge, Ohio;
ELWOOD MURPHY,
Grand Theatre Bldg., Columbus, Ohio;
F. S. MONNETT,
35 E. Gay St., Columbus, Ohio,
Counsel for Respondent and Appellee Below.

(35,701)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. 779

SUN INSURANCE OFFICE, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is one of five cases at law commenced by the respondent, the plaintiff below, against your petitioner,

the defendant below, and four other insurance companies, which were brought in the State Court of Ohio and removed to the United States District Court for Southern Ohio upon the ground of diversity of citizenship, where the five cases were consolidated by order of the District Court. Two of these five cases, in which the New York Underwriters Insurance Company and the Westchester Fire Insurance Company were defendants below, terminated in judgments by the United States Circuit Court of Appeals, Sixth Circuit, reversing the judgments of the District Court, which had been in favor of the plaintiff below, and are therefore not here for consideration. There was but one opinion rendered by the Circuit Court of Appeals in passing upon the merits of all five of the cases.

Identical petitions for writs of certiorari and identical briefs in support thereof are now filed in this Court by the defendants below, Sun Insurance Office, Norwich Union Fire Insurance Society, Ltd., and The Home Insurance Company, against each of which judgments were rendered by the District Court (R. 45), and affirmed by the United States Circuit Court of Appeals, Sixth Circuit (R. 248), by a divided court.

Each of these suits sought a recovery upon a policy of fire insurance issued upon wool, including woolen bags, belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows (R. 34, 35): "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest

of the insured be other than unconditional and sole ownership, * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision (Sun Insurance Office, R. 132, 133, Exhibit 4; Norwich Union Fire Ins. Soc., R. 135, Exhibit 5; Home Ins. Co., R. 104, 105, Exhibit 1) that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was admitted in the pleading (R. 21, 28) and established without dispute (R. 58) that on June 19, 1926, the plaintiff executed a chattel mortgage on the property to the Cumberland Savings Bank Company, and that this chattel mortgage was subsisting with the principal unreduced at the time of the fire.

Endorsed upon the policy in suit was the following loss-payable clause (Sun Ins. Office R. 127) (Norwich Union Fire Ins. Soc. R. 135) (Home Ins. Co. R. 104):

"Loss Payable Clause.

"Any loss under this policy that may be proved due shall be payable to the assured and

The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The question involved in view of the foregoing is whether, as held by the majority opinion of the Court of Appeals, this loss-payable clause, which neither mentioned a chattel mortgage nor described the payee therein as chattel mortgagee nor recognized any property right in such payee in the property insured, constituted a written waiver of the prohibited chattel mortgage.

The policy in suit further provided (Sun Insurance Office R. 131) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 109) that, in the event of disagreement as to the amount of loss, the same should be ascertained by appraisers, the insurance company and the insured each selecting an appraiser and the two so chosen to select an umpire, and that the award in writing of any two should determine the amount of such loss.

The policy further provided (Sun Ins. Office R. 132) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 110) that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until after full compliance by the insured with all the above requirements, and that the loss should not become payable until sixty days after such ascertainment, including an award by appraisers (R. pages 109-110).

After the fire and before any communications whatever were had by the insurance company, or any rep-

resentative thereof, with the plaintiff below, a written non-waiver agreement was signed and entered into by and between the parties (R. 141, 142), which provided, in part, as follows:

> "It is hereby mutually stipulated and agreed that any action taken by the insurance company or companies, signing this agreement, in ascertaining the amount of loss and damage which occurred September 6, 1926 to property located in rear lot W/S of Cambridge St. Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.
>
> "Notice is hereby given and accepted, and it it hereby mutually understood and agreed, that no representative of any insurance company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing."

After sworn proofs of loss, in which the plaintiff set forth his claim as to the amount of loss, were furnished by the plaintiff below to the defendant insurance company (Sun Insurance Office R. 175, Exhibit 17) (Norwich Union Fire Insurance Society R. 187, Exhibit 18) (Home Insurance Company R. 142, Exhibit 14), and the defendant insurance company advised the plaintiff below in writing that the defendant insurance company disagreed with the plaintiff below as to the amount of the loss caused by the fire in question, as stated in his proof of loss (Exhibit 19) Home

Insurance Company R. 198, (Exhibit 22, Sun Insurance Office R. 202) (Exhibit 23, Norwich Union Fire Insurance Society, Ltd., R. 203), then, without further communication, oral or written, between the parties, the plaintiff below commenced the present suit without obtaining an award of appraisers fixing the amount of the loss, or making any demand or request therefor. The disagreement between the parties as to the amount of loss and plaintiff's failure to obtain an award of appraisers as to the amount of the loss were alleged by the defendant below in its answer (R. p. 34).

In the face of these undisputed facts, and in spite of the rule settled by the Supreme Court of Ohio and binding upon the Federal courts, that such disagreement as to the amount of loss made the procurement by the insured of an award of appraisers fixing the amount of the loss a condition precedent to any right of action, the District Court held (R. pp. 94, 95) that no obligation rested upon the insured, plaintiff below, to obtain an award of appraisers as a condition precedent to a right of action on the policy. The United States Circuit Court of Appeals, on the other hand, in its majority opinion, while recognizing that an award of appraisers was a condition precedent to a right of action, held that the performance of such condition precedent by the plaintiff below had been waived, because, as the Circuit Court of Appeals said in its opinion, "the defendant denied liability before suit was brought and after it was brought" (R. 229).

There is no evidence whatever in the record of any denial of liability by the insurance company prior to

the commencement of suit, and the only action taken by the defendant insurance company after commencement of suit was its action in filing its answer, in which it pleaded two defenses, as permitted by the statutes of Ohio: (1) The defense of failure by the plaintiff below to perform the condition precedent of the contract as to appraisal, and (2) the further consistent defense of incumbrance of the property by chattel mortgage, in violation of the terms of the policy.

Another question involved, in view of the foregoing, is whether, as held by the majority of the Court of Appeals, an insurance company whose only dealings with the insured after a loss are under a non-waiver agreement, and whose only communication with the insured consisted of a written disagreement with the insured as to the amount of the loss without in any way denying liability, and whose only action after suit is brought is the filing of an answer setting up two consistent defenses (as here, failure to obtain an award of appraisers and violation of the condition prohibiting incumbrance by chattel mortgage) can be deemed to have waived, or held to be estopped to set up, the insured's non-performance of the appraisal condition.

The trial in the United States District Court was by jury and a verdict and judgment by direction of the District Court were rendered in favor of the respondent, J. M. Scott, and against the petitioner herein, Sun Insurance Office, for $6,412.50, which included interest from the date of the fire (R. 45). An appeal from said judgment was taken by the petitioner herein, Sun Insurance Office, to the United States Circuit

Court of Appeals, Sixth Circuit (R. 206 to 222), which affirmed the judgment of the United States District Court (R. 248) by a divided court (see dissenting opinion of Judge Killetts, R. 230-245) after a certified copy of a remittitur of the interest from the date of the fire, September 6, 1926, until December 4, 1926, had been filed (R. 246, 247) in accordance with the order of the United States Circuit Court of Appeals (R. 224). A petition for rehearing was filed in the United States Circuit Court of Appeals by your petitioner herein on January 9, 1931 (R. 249), and was denied, Judge Killetts dissenting, on February 10, 1931 (R. 261).

II.

Reasons Relied Upon for Allowance of the Writ.

A.

The majority decision of said Circuit Court of Appeals in holding that the appointment of a creditor to receive the proceeds of a fire-insurance policy by written endorsement on the policy of a loss-payable clause, which by its terms is expressly made subject to all the conditions of the policy, is a written waiver of a condition of the policy prohibiting chattel mortgage, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497 (opinion by Judge Van Devanter).

B.

The majority decision of said Circuit Court of Appeals as to the effect of the loss-payable clause attached to the policy in suit, by holding that such loss-payable clause—though by its express terms it was "subject to all the terms and conditions of the policy", and though such loss clause contained no reference to chattel mortgage and no description of the payee as chattel mortgagee or as having any interest whatever in the property—is nevertheless a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage, there being no pleading or proof of a course of dealing between the parties or of usage and custom qualifying the unambiguous language used, has decided an important question of general law in a way probably untenable or in conflict with the weight of authority, including the decision by this Court in

Bates vs. Equitable Insurance Co., 10 Wall. 33.
Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

C.

The majority decision of said Circuit Court of Appeals in considering and basing its decision upon a custom, when not pleaded or in evidence, and ingrafting a meaning into a contract by construction based upon such assumed, unpleaded and unproven custom, where the written contract is clear and unambiguous and not open to construction (Majority Opinion, R. 227-228), has decided an important question of general law in a way probably untenable or in conflict with the weight

of authority and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Bates vs. Equitable Insurance Company, 10 Wall. 33.

D.

The majority decision of said Circuit Court of Appeals while professing to hold, in accordance with the law as settled by this Court, that knowledge of the insurer's agent, not communicated to his principal, of the prohibited incumbrance by chattel mortgage may not be imputed to the insurer to effect a waiver or estoppel under the form of insurance contract here involved, has, nevertheless, in its opinion, in fact given effect to evidence of such claimed knowledge by the agent in deciding that "the purpose in attaching the loss-payable clause was to grant authority to incumber the property", and in holding that "the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage" (R. 228). Such decision by the majority of the Circuit Court of Appeals is an erroneous decision of an important question of general law, and a decision in conflict with the law as settled by this Court on the question.

Northern Assurance Company vs. Grand View Building Association, 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Company, 216 United States Reports, 311 (1910), Syl, and pp. 321-322.

Mutual Life Insurance Co. vs. Hilton Green, 241 United States Reports, 613, 624 (1916).

Ætna Life Insurance Company vs. Moore, 231 United States Reports, 543, 559 (1913).

Prudential Insurance Company vs. Moore, 231 United States Reports, 560—Syl. 3 (1913).

E.

The majority decision of said Circuit Court of Appeals in holding that an insurance company, which simply disagrees with the insured's claim as to the amount of the loss without denying liability prior to suit, and which, subsequent to suit, merely files an answer alleging the defense of failure by the insured to perform the condition precedent as to appraisal of the amount of loss and alleging further a defense of incumbrance by chattel mortgage in violation of the terms of the policy, has thereby waived performance by the insured of the appraisal condition precedent of the policy, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

Insurance Company vs. Carnahan, 63 Ohio State, 258, Syllabi 5 and 7.

Graham vs. Insurance Co., 75 Ohio State, 374.

Edward Everett Co. v. Great American Insurance Company, 9 Ohio *nisi prius* Reports (new series), 241 (affirmed 81 Ohio State, 573).

Fire Association vs. Agresta, 115 Ohio State, 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd), 754.

F.

The great importance to the business world and the insuring public, as well as the legal profession, and the need of an authoritative and elucidating decision by this Court as to the legal and operative effect of a loss-payable clause of the form here involved, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict of opinion between the various Circuit Courts of Appeal and the judges of the United States Circuit Court of Appeals in this case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 5278, Sun Insurance Office, appellant, *vs.* J. M. Scott, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and

that your petitioner may have such other and further relief as to this Honorable Court may seem meet, just and proper.

SUN INSURANCE OFFICE,
By ROLLAND M. EDMONDS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 779

SUN INSURANCE OFFICE, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinions in the United States Circuit Court of Appeals, Sixth Circuit, which have not yet been reported, appear: Majority Opinion (R. 224-230); Dissenting Opinion (R. 230-245).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 6, 1931 (R. 248).

The petition for rehearing filed by this petitioner January 9, 1931 (R. 249), was denied February 10, 1931 (R. 261), Judge Killetts dissenting.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is *Judicial Code, Section* 240, as amended by the act of February 13, 1925, Chapter 229 (43 Statutes at Large, pp. 938, 939) (28 U. S. C. A. No. 347).

3. This is a civil action in the United States Circuit Court of Appeals for the Sixth Circuit in which a judgment has been rendered against this petitioner (R. 248) and in which a petition for rehearing has been filed (R. 249) and denied (R. 261).

The jurisdiction of this Court is invoked upon the several grounds specifically assigned in the petition submitted herewith and hereafter summarized in this brief under the heading "Specification of Errors."

4. The cases believed to sustain such jurisdiction are as follows:

Forsyth vs. Hammond, 116 United States Reports 506, 514, 515.

Delk vs. St. Louis & San Francisco R. R. Co., 220 United States Reports, 580-586.

Lau Ow Bew vs. United States, 144 United States Reports, 47, 58.

III.

Statement of the Case.

This case has already been stated in the preceding petition for writ of certiorari under subdivision I, headed "Summary Statement of the Matter Involved" pp. 1-8.

Supplementary thereto and with particular reference to the increase of hazard involved in the prohibited incumbrance by chattel mortgage in the instant case, we quote the following additional facts in the language of the dissenting Circuit Court of Appeals opinion of Judge Killetts (R. 239-240), with appropriate record pages added thereto:

> "First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued (Exhibits 4 and 5, R. 125, 133). Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market (R. 78). His proof of loss admits that this property cost him in 1925 $34,800.00, a shrinkage in value of 17½ per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926 (R. 78), or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200 (R. 76),

'represented (language of chattel mortgage) (Exhibit 24, p. 204) by various promissory notes of various dates and amounts', signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,000, was at the same time cashier of the chattel mortgagee bank (R. 81). August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy (R. 78). August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved 'several times to see Mr. Scott (the insured) on business.' The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

"I draw no inferences from these facts save, 1. That Scott was in losing and involved circum-

stances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used."

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in finding and holding, though the loss-payable clause by its express terms was subject to all the terms and conditions of the policy, and though the loss-payable clause contained no reference to chattel mortgage and no description of the payee as a chattel mortgagee or as having any interest whatever in the property, and though the loss-payable clause did not contain the words "as interest may appear", that nevertheless

the loss-payable clause in this case constituted a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage in the entire absence of pleading or proof of a course of dealing between the parties, or of usage, or custom, qualifying the unambiguous language used.

2. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in altering the clear and unambiguous language of the written insurance contract by a construction thereof based upon a supposed custom or usage assumed by the court, and for which there is no foundation either in the pleadings or the evidence or in point of fact.

3. The Circuit Court of Appeals for the Sixth Circuit in construing and declaring the effect of the clear and unambiguous language of the loss-payable clause and the policy in suit erred in this action at law, in which there was no pleading or proof of fraud or mutual mistake, in considering and giving effect to the claimed knowledge of this petitioner's local soliciting agent of the incumbrance by chattel mortgage, which knowledge was acquired in his capacity as cashier of the adversely interested payee bank, and was not communicated to the insurance company.

4. The Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that an insurance company has waived performance by the insured of the appraisal condition precedent of the policy when the insurance company has simply disagreed with the insured's claim as to the amount of the loss without deny-

ing liability prior to suit, and when subsequent to suit the insurance company has merely filed an answer alleging the defense of failure by the insured to perform this condition precedent as to appraisal of the amount of the loss, and alleging a further defense of incumbrance by chattel mortgage in violation of the terms of the policy.

V.

Summary of the Argument.

1. THE LOSS-PAYMENT CLAUSE RIDER WAS NOT A WAIVER OF THE PROHIBITED INCUMBRANCE BY CHATTEL MORTGAGE.

Point A. The provision in the policy prohibiting chattel mortgage without consent endorsed in writing thereon, intended as it is to reduce the moral hazard, is valid, and violation thereof by incumbrance of any of the property insured constitutes an entire defense.

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Mulrooney vs. Royal Insurance Co., 163 Fed. 833 (C. C. A. Iowa, 1908), First Syllabus, p. 835.

Hartford Fire Ins. Co. vs. Downey, 223 Fed. 707 (C. C. A. W. Va. 1915), Syllabus, pp. 712, 715.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schild, 69 O. S. 136.

National Fire Ins. Co. vs. Kneidel, 11 O. C. C. (N. S.) 193 (Hamilton County).

Hammel vs. Insurance Co., 24 O. C. C. 101 (Pickaway County).

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Point B. The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office, well known in insurance practice, of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

Atlas Reduction Company vs. New Zealand Ins. Co. (C. C. A., Judge Van Devanter), 138 Fed. 497-508.

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

Point C. Even though the loss-clause rider had contained the added words "as interest may appear", which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Insurance Co. (District Court, Southern District, Fla. 1924), 1 Fed (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A., Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

Point D. The absence in the loss-clause rider here in question of the phrase "as interest may appear" upon which alone the dissenting opinion in *Atlas Reduction Co. vs. New Zealand Ins. Co.*, 138 Fed. 487, and the other decisions cited by the majority, were based, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar wholly without precedent and in direct conflict with the controlling decision of this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

1. IF, AS THE MAJORITY ASSERT, THE ABSENCE OF THE PHRASE "AS INTEREST MAY APPEAR" IS WITHOUT SIGNIFICANCE, THEN THE MAJORITY OPINION IN THE INSTANT CASE IS IN SQUARE CONFLICT WITH THE FOLLOWING CORRECTLY DECIDED CASES:

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla., 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A. Kansas, 1903), 120 Fed. 916.

Point E. Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," and that if insurance contracts

(as here) "are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

Insurance Co. vs. McNulty, 157 Fed. C. C. A. 224, 226.

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther (Decided Feb. 24, 1930), 281 U. S. 34.

Point F. The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with its clear wording, upon a supposed custom or usage assumed by the majority and for which there is no foundation in the pleadings or the evidence or in point of fact.

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Point G. The loss-clause rider in the instant case was not a waiver of the prohibited incumbrance by chattel mortgage because the loss-clause rider was not informative to the insurer of the existence of the inhibited lien, and the knowledge of the insurer's agent of such lien may not be imputed to his principal under this form of policy—no actual knowledge by the insurer being otherwise shown.

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Northern Assurance Co. vs. Grand View Building Asso., 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605.

Penman vs. St. Paul Fire & Marine Ins. Co., 216 United States Reports, 311 (1910).

Mutual Life Ins. Co. vs. Hilton Green, 241 United States Reports, 613.

Ætna Life Ins. Co. vs. Moore, 231 United States Reports, 543.

Prudential Insurance Co. vs. Moore, 231 United States Reports, 560.

Point H. Knowledge of the insurer's agent, Bracken, of the inhibited lien and his act in preparing this form of loss-clause rider may not be imputed to his insurance company principal for the additional reason that he was then acting in a dual, incompatible capacity for his bank principal, on the one hand, and for his insurance company principal, on the other.

Point I. The importance to the insuring public and to the insurance companies of an authoritative judicial declaration as to whether it is possible by the form of loss-clause rider here employed to secure a creditor of the insured who has no interest by way of mortgage or otherwise in the insured's property against the casualty of fire without thereby thrusting the materially increased hazard of chattel mortgage incumbrance upon the insurer, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict between the

Circuit Courts of Appeals, including the Judges of the Circuit Court of Appeals in the instant case.

2. NON-COMPLIANCE BY THE INSURED WITH THE CONDITION PRECEDENT REQUIRING APPRAISAL OF THE AMOUNT OF THE LOSS WAS A BAR TO THE INSURED'S RECOVERY.

Point J. The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of loss without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against incumbrance by chattel mortgage, did not waive its right to legal performance by the insured of the condition requiring an award of appraisers fixing the amount of the loss as a condition precedent to the insured's right of action on the policy.

Insurance Co. vs. Carnahan, 63 Ohio State 258.

Graham vs. Insurance Co., 75 Ohio State 374.

Edward Everett Co. vs. Great American Ins. Co., 9 Ohio *Nisi Prius* Reports (New Series) 241 (Affirmed 18 Ohio State 573).

Fire Association vs. Agresta, 115 Ohio State 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd) 754.

ARGUMENT.

1. The Loss-payable Clause Rider.

POINT A.

The policy provision prohibiting chattel mortgage without consent thereto endorsed in writing upon the policy is valid, and violation thereof constitutes an entire defense.

The insurance contract in suit expressly provides:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

The validity of this clause prohibiting incumbrance by chattel mortgage, and the proposition that violation thereof is an entire defense to any recovery on the policy, is settled by an unbroken line of decisions both by the Federal courts and the courts of Ohio.

Mulrooney vs. Royal Ins. Co. (C. C. A. Iowa, 1908), 163 Fed. 833.

(Page 835:)

> "That a mortgage of personal property increases the insurance hazard is not disputed. Provisions in insurance policies that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing upon the policy, are valid provisions. Atlas Reduction Co.

v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 777, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Assurance Co. *v.* Bldg. Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases therein cited."

As this court held in

Carpenter vs. Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 510,

"the underwriters did not rely so much upon the principles as upon the interest of the insured."

To the same effect are:

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Hartford Fire Ins. Co. vs. Downey (C. C. A., W. Va., 1915), 223 Fed. 707, 712, 715.

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

National Fire Ins. Co. vs. Kneidel, 11 Ohio Circuit Court (N. S.) 193, Hamilton County.

Hammel vs. Ins. Co., 24 Ohio Circuit Court, 101, Pickaway County.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schield, 69 O. S. 136.

POINT B.

The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office well known in insurance practice of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

It is the unquestionable legal right of an insured to select and nominate for coparticipation in the proceeds of his contract a person who has no interest of any kind in the insured property. When that is done, the insurer is called upon only to consider in case of loss whether it will honor such appointment. As held in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497:

> "Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, skill, and success in trade, but who requires some indemnity against such accidents as loss by fire."
>
> "It is not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss."

See also

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33,

and minority opinion by Judge Killetts in the instant case (R. 236, last paragraph, and R. p. 244).

POINT C.

Even though the loss-clause rider had contained the added words "as interest may appear," which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

The exact language of the loss-payable-clause rider in the case at bar is as follows (R. 127):

> "Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The provisions of the policy pertinent to this discussion are the following, as quoted in the dissenting opinion (R. 233):

> "1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such pro-

visions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

"2. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

"3. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply to the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

It was squarely held in

Atlas Reduction Co. vs. New Zealand Ins. Co., (Majority opinion by Judge Van Devanter), 138 Fed. 497,

as to a loss-clause rider identical with that in the instant case, except that the rider there contained the additional words "as interest may appear," which are significantly absent here, that—

"(*e*) The endorsement does not give consent to the incumbering of the insured personal property by a chattel mortgage (1) because it does not mention a chattel mortgage, or describe D. & S. as chattel mortgagees, or show

that the attention of the parties was directed to a chattel mortgage; (2) because it was not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss; and (3) because the words 'subject to all the conditions of this policy' show that the conditions were not intended to be abrogated or waived, but to have effect and be respected as if the indorsement had not been made, and among the conditions of the policy are these: 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage * * * and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy * * * unless such waiver, if any, shall be written upon or attached hereto."

and (Opinion, p. 508)—

"that the indorsement did not in terms or by implication consent to the incumbrance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance."

To the same effect are:

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Green (C. C. A. Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

POINT D.

The absence from the loss-clause rider here in question of the phrase "as interest may appear," upon which was based the dissenting opinion in the Atlas Reduction Co. Case, 138 Fed. 497, and the other decisions cited by the majority of the Circuit Court of Appeals, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar without precedent and in direct conflict with a controlling decision of this court.

This proposition cannot be more admirably stated than in the language of Judge Killetts in his able dissenting opinion in the case at bar (R. 234-235; 236-238):

> "In the Atlas Case (138 Fed. 497) the rider waiver, whose sufficiency was questioned, was: 'Subject to all of the conditions of this policy, loss, if any, payable to D. & S. as their interest may appear.' The majority holding was that this language did not 'in terms or by implication consent to the incumbrance created by the chattel mortgage.' Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase 'as interest may appear' was used in such cases to refer to a chattel mortgage interest. This Court (Sixth Circuit) in Commercial Union Insurance Company v. Marshall, 18 Fed. (2) 457, 458, 459, where the rider was: 'any loss * * * proven to be due to the insured on this policy shall be held payable to D. as

interest may appear', indicated its preference for Judge Hook's reasoning and conclusion, but found that it 'expressly appeared', in the record before it, 'that according to the usages and practices of the community and of these insurance companies, this phrase "as interest may appear" was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest.' It was also held, independently of Judge Hook's view in the Atlas case, that 'the stipulation that the loss should be payable to Dacus "as interest may appear" * * * applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter.'

"In Firemen's Insurance Company *v.* Brooks, also by this Court, 32 Fed. (2nd) 451, the rider was, page 451, 'Any loss * * * shall be payable to Thomas Trimby, as interest may appear, subject, nevertheless, etc.' In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." * * *

"The foregoing concerning Judge Hook's

position in the Atlas case, and the view of this Court (Sixth Circuit) in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase 'as interest may appear' in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof. These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

"It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that when that is done the insurer is called upon only to consider whether in case of loss it will honor such appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq. 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See also, the Bates case, infra. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties,

while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent 'where plain and unequivocal language is employed'.

"I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

"Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

"First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the 'as interest may appear' decisions, for that important phrase is entirely absent. Its wording is: 'Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy.'

"Secondly, there is not the slighest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

"Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra,* that the rider is 'in the form of words in a printed rider regularly used by the insurance companies for covering and describ-

ing that kind of interest,' i. e., chattel mortgage interest.

"In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted stipulations which the majority considers it to qualify—these three factors and, absolutely nothing else."

The decision of the majority of the Circuit Court of Appeals in the instant case is therefore wholly without the support of precedent, and in fact is in direct conflict with the law as settled by this court in *Bates vs. Equitable Insurance Co.*, 10 Wallace, 77 U. S. 33,

where, as in the case at bar, there was no attempt to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used, and where, as in the case at bar, there was no attempt to show what was in the record in the *Marshall* case (18 Fed. (2nd) 457), relied upon by the majority, namely, that the rider here used is "in the form of words in a printed rider ordinarily used by the insurance companies for covering and describing that kind of interest" that is, chattel mortgage interest.

The policy in the *Bates* case provided that if the property were sold the insurance ceased unless the insurer consented in writing, and it was held by this Court that an endorsement on the policy that the

policy was "payable in case of loss to E. C. Bates," followed by the insurer's endorsement that "consent is hereby given to the above endorsement," did not imply either knowledge or consent to a sale of the insured property. In that case the property had been sold to Bates, the appointee. In that case, as here, there was, as noted by Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or a usage and custom which qualified the language used, wherefore this Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the company that any loss sustained by Philbrick, covered by that policy, should be paid to Bates."

As to the *Bates* case the majority of the opinion of the Circuit Court of Appeals in the instant case says:

> "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

As stated by Judge Killetts in the dissenting opinion in the instant case (R. 243):

"In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the Bates case, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.''

POINT D-1.

If it be assumed, as asserted in the majority opinion of the Circuit Court of Appeals in the instant case (R. 227), that the absence from the loss-clause rider in the instant case of the words "as interest may appear" is immaterial, then the majority opinion in the instant case is, as it professes to be (R. 228), in square conflict with the unanswerable majority opinion of Judge Van Devanter in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

POINT E.

Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," but that, if insurance contracts, as here, "are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

The only clause in any form of loss-payable rider considered in any of the cases referred to in the majority and dissenting opinions of the Circuit Court of Appeals in the instant case which has been asserted by any Judge to be even potentially ambiguous is the clause "as interest may appear." Even the majority, in its opinion, in the instant case, does not venture to assert that the loss clause rider here in question, from which the parties have deliberately eliminated the phrase "as interest may appear," is ambiguous or fairly susceptible, from its own language alone, of the construction that it is intended as a consent to the prohibited chattel-mortgage lien. On the contrary, the clear language is that "any loss under this policy *that may be proved due* shall be payable to the assured and the Cumberland Savings Bank Company, Cumberland, Ohio, *subject, nevertheless, to all the terms and conditions of the policy.*"

Because these insurance contracts are thus clear and unambiguous, they are "to be construed according to the sense and meaning used, and if they are clear and unambiguous, their terms to be taken and understood in their plain, ordinary and popular sense," as held by this Court in

Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther, 281 U. S. 34 (decided Feb. 24, 1930).

The rule that where the insurance contract is fairly susceptible of two different constructions, that one will

be adopted which is favorable to the insured, "ought not to be permitted to have the effect (as in the majority opinion in the case at bar) to make a plain agreement ambiguous and then to interpret it in favor of the insured."

Insurance Co. vs. McNulty, 157 Fed. (8 C. C. A.), 224, 226.

In the language of Judge Killits in his dissenting opinion in the instant case:

> "My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that 'resort cannot be had,' in a case such as here, to the rule respecting resolution of ambiguities, because there is here no 'double meaning' for that here the language used will not 'fairly and reasonably support that construction upon which liability of the insurer may be sustained.'"

POINT F.

The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with the rider's clear wording, upon a supposed custom or usage assumed by the court, and for which there is no foundation in the pleadings or in the evidence or in point of fact.

It is only where the possibly ambiguous phrase "as interest may appear" or other ambiguous language is employed in the loss-payable clause or policy, that a pleading and proof of a custom or usage that the phrase "as interest may appear" was understood to include a chattel-mortgage interest would be relevant to aid in a construction of the contract. In the absence of ambiguity and of such pleading and proof of custom or usage, the construction of the policy-and-loss clause must be "determinable upon the implications arising from the endorsements alone."

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Here the loss-clause rider contains no such phrase "as interest may appear."

Here there is no ambiguity of any kind.

Here there is no pleading or proof of custom or usage.

On the contrary, as said by Judge Killits in the instant case in his dissenting opinion:

> "In the instant cases there are none of the qualifications, such as are referred to in the

foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the *Bates case*, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.' "

Yet the majority Circuit Court of Appeals opinion, in the instant case, only achieves a holding that "the purpose in attaching them (the loss-payable-clause riders) was to grant authority to encumber the property by chattel mortgage"—

(1) By assuming an ambiguity which does not exist in the language, and

(2) By assuming a usage or custom that the loss-payable-clause rider, as here, phrased without the words "as interest may appear," was understood to permit chattel-mortgage encumbrance, though such assumed custom is neither pleaded, nor in proof, nor is in accordance with the actual facts.

POINT G.

The loss-payable rider was not a waiver of the prohibited encumbrance by chattel mortgage, because by its language it was not informative to the insurer of the existence of the inhibited lien, and knowledge of the insurer's agent may not be imputed to his principal under this form of policy, no actual knowledge by the insurer being otherwise shown.

The policy provision (hereinbefore quoted) in the instant case limiting the validity of waivers and modifications of the contract to such waivers as are en-

dorsed in writing upon the policy has frequently been construed by this Court.

Under that provision, an endorsement or rider claimed to work a waiver, as provided in that stipulation of the policy, must be so worded that the acceptance of it by the insurer should be regarded *as an agreement* to continue the contract in spite of the otherwise voiding presence of a mortgage lien; that is, that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgage.

The construction and effect of that provision was settled by this Court in

Insurance Co. vs. Grandview Building Assoc., 183 U. S. 361,

where it was held that the

> "limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture*, dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts*, ratified the action of the agent."

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

The doctrine of the Grandview Building Association case has been repeatedly reaffirmed by this Court.

Lumber Underwriters vs. Rife, 237 U. S. 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Co., 216 U. S. 311 (1910), Syl. and pp. 321, 322.

Mutual Life Insurance Co. vs. Hilton Green, 241 U. S. 613, 624 (1916).

Ætna Life Insurance Co. vs. Moore, 231 U. S. 543, 559 (1913).

Prudential Insurance Co. vs. Moore, 231 U. S. 560, Syl. 3 (1913).

The loss clause neither describes the payee as mortgagee, nor by words or intimation in any manner mentions chattel mortgage. The clause here, therefore, clearly is not informative to the insurer to the existence of the inhibited chattel mortgage, but performs an entirely different office well known to insurance practice, of appointing a person having no interest in the insured property to participate in the policy's proceeds.

Under the non-waiver clause of the insurance contract, knowledge by the insurer's agent of the prohibited chattel mortgage is not imputed to the insurer.

There is no proof whatever that the insurance company itself knew of the mortgage, or had the slightest hint that the bank was interested in the insured property in any way. Nor is there any proof, or even pleading, that it was intended by this phraseology of the loss-clause rider to convey such information to the insurer or to have the rider work a waiver of the defeasance clause in the contract.

In the face of these undisputed facts, and the entire lack of ambiguity in the contract, and in the face of this rule settled by this Court of non-imputation of the agent's knowledge, the majority of the Court of Appeals, in its opinion, holds that "the endorsements (loss-payable riders) were intended to authorize the encumbrance of the property by chattel mortgage", and bases that holding on the further assertion that "in this case it clearly appears that the endorsements were made with full knowledge of the facts".

In the unanswerable language of Judge Killits in the dissenting opinion (R. 244):

> "Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the

matter of what knowledge the insurers had of the purpose of the riders that counts."

POINT H.

Knowledge of the insurer's agent, Bracken, of the inhibited lien when he attached the rider, and his act in employing this form of rider, may not be imputed to his insurance company principal, for the additional reason that Bracken was acting in a dual incompatible agency for his bank principal on the one hand, and for his insurance company principal on the other.

It cannot be said in this case that the production and attachment of the closs-clause riders employed in this case by Bracken was the act of his insurance company principal, because of the incompatible duality of representative obligations of Bracken, cashier of the payee bank. These obligations were then wholly incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and correspondingly to the disadvantage of his insurance company principal. This incompatible duality makes it impossible to attribute to the insurer any act of his which favored either the bank, or the insured through the bank.

Mulrooney vs. Insurance Co., 163 Fed. 133, 135 (9 C. C. A.).

American Surety Co. vs. Pauly, 170 U. S. 133.

POINT I

The great importance to the business world, the insuring public, and the insurance companies of an authoritative judicial determination of the legal effect of the loss-clause rider here employed calls for a review and final determination of this case by this Court, and particularly so in view of the direct conflict of opinion between various Courts of Appeals and the Judges of the Court of Appeals in the instant case.

It is of vital importance to the insuring public to be able, as security for indebtedness due from the insured, to designate a creditor who has no interest in the insured property as payee in case of fire loss, without thereby assuming the greatly increased premium expense properly chargeable to the materially increased hazard incident to a permitted encumbrance by chattel mortgage.

It is likewise of vital importance to the insurance companies to know whether, by use of the particular form of loss-clause rider here employed, the purpose thereof has been accomplished by permitting this highly desirable commercial transaction without thereby imposing upon the insurance company the material increase of hazard of chattel mortgage encumbrance. As this Court held in

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively

small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

POINT J.

The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of the loss, without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against encumbrance by chattel mortgage, did not waive its right to require performance by the insured of the condition requiring an award of appraisers fixing the amount of loss as a condition precedent to the insured's right of action on the policy.

The validity or interpetation of an insurance con-

tract—as distinguished from the question as to what constitutes waiver of modification thereof—is governed by state law.

Hartford Fire Ins. Co. vs. Nance, 12 Fed. (2d) 575, 576.

Carpenter vs. The Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 511, 512.

Ætna Insurance Co. vs. Moore, 231 U. S. 543.

Liverpool and Great Western Steam Co. vs. Phœnix Insurance Co., 129 U. S. 397, 443.

It is the settled Ohio rule of construction of the standard fire insurance policy here involved, binding on the Federal courts, that the condition of the insurance contract requiring the amount of loss to be fixed by a board of appraisers in the event of disagreement between the insured and the insurer as to the amount of loss, is a condition precedent, the performance of which is mandatory upon the insured before a cause of action against the insurer on the policy matures.

In *Graham vs. Insurance Co.*, 75 O. S. 374, it is held in the first syllabus (which is controlling in Ohio):

> "• • • such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss, except as such condition is modified as to a total loss (to real estate) by Section 3643, Revised Statutes; and in a suit to recover such a loss, in the absence of an award of appraisers,

and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown."

To the same effect is

Insurance Co. vs. Carnahan, 63 O. S. 258, Syllabus 5.

The majority of the Circuit Court of Appeals in its opinion disposes of the defense of plaintiff's failure to obtain an award of appraisers in the following language:

> "There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and the defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained."

The sole ground of the majority's holding that the plaintiff's failure to obtain an award of appraisers was not a bar to his recovery is thus the assumption of the majority that—

> "The defendants denied liability before suit was brought and after it was brought."

This is an assumption in direct conflict with the facts in the record.

An examination of the record will disclose that the question of liability or non-liability by the insurance company was never discussed, before suit was brought, between the plaintiff and defendant either orally or by writing. The only witness who testified as to any oral conversation with the adjuster of the company after the loss was the plaintiff himself, who testified that the conversation was under non-waiver agreement (Ex. 7, R. 141), and nowhere in his testimony does he claim or even intimate (R. 75, 78) that the adjuster of the insurance companies ever at any time denied liability. The only communication in writing from the insurance company to the plaintiff, appellee, prior to suit, was the letter of November 24, 1926, in which the insurance company set forth the respects in which the proofs of loss furnished by the insured did not conform to the requirements of the policy, and in which the company expressly disagreed with the plaintiff as to the amount of the loss. This letter appears as "Exhibits 19, 22 and 23" (R., pp. 198, 202, 203). On its face this letter shows that it does not contain or purport to contain any denial of liability.

As held in *Orenstein vs. Star Ins. Co. of America*, 10 Fed. (2d) 754:

> "Syl. 2. Insurer did not waive defense of increase of hazard by not denying liability on this account, when rejecting proofs of loss on the ground that they did not correctly state the loss; there being then no denial of liability on

any ground, and the rejecting being but an 'action taken' relative to the amount of loss, within the prior non-waiver agreement of the parties, expressly preserving insurer's rights and defenses from loss by waiver."

Page 757:

"Defendants did not deny liability on the policy when rejecting the proofs of loss upon a different ground from that set up in the answer. *They did not deny liability at all. They simply rejected the proofs submitted, on the ground that they did not correctly state the loss.* This could not amount to a waiver because the rejection of the proofs of loss was an 'action taken' under the terms of the non-waiver agreement quoted above, which expressly preserved defendants' rights and defenses. * * *

"The execution of the non-waiver agreement was in itself notice that the defendants might assert defenses against the policies. The fact that the defendants did intend to assert such defenses could not possibly preclude them from insisting that any action taken under the non-waiver agreement be taken in accordance with the terms and provisions of the policies or from insisting on a forfeiture in case of a breach of its conditions."

This rule likewise prevails in the courts of Ohio, as held in *Edward Everett Co. vs. German American Ins. Co.*, 9 Ohio *Nisi Prius* (N. S.), 241 (affirmed 81 O. S., 573):

Syl. "A reply by an insurance company to a proof of loss, that it has reason to believe the

> cash value of the loss was much less and the salvage much more than claimed by the insured, *is not a denial of liability* by the company or a waiver of the provision of the policy for an appraisal, but amounts to a disagreement with the insured as to the amount of loss sustained and calls for an appraisal, and in a subsequent action on the policy it is not competent for the insured to give his reasons for not demanding an appraisal."

The Circuit Court of Appeals is therefore clearly in error in stating as the ground of its majority decision that "the defendants denied liability before suit was brought."

After suit was brought, the record shows that the only step taken by the defendant was to file its answer, in which the defendant, as permitted by the statutes of Ohio, set forth as many consistent defenses as it had, including the defense of plaintiff's failure to secure an award of appraisers, required as a condition precedent in the contract, and including also plaintiff's violation of the condition prohibiting incumbrance by chattel mortgage.

The Ohio statute in this connection, Ohio General Code 11315, is as follows:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer."

A denial of liability made after suit is brought, whether in a pleading or otherwise, could not induce the insured to believe that his performance of such condition precedent would be futile, because the commencement of the action fixes the rights of the parties as to performance or non-performance of such conditions precedent to the maturing of a cause of action.

The holding of the Circuit Court of Appeals majority on this point nullifies the statutory permission given a defendant under the statutes of Ohio to set up as many consistent defenses in his answer as he may have, and is in direct conflict with the law of Ohio as settled by the following decisions:

Insurance Company vs. Carnahan, 63 O. S. 258:

> Syl. 7. "Under Revised Statutes, Section 5071 (Gen. Code 11315), a defendant may set forth in his answer as many grounds of defense, counter-claim or set-off as he may have, provided that they are so far consistent that they can be verified by oath without swearing falsely; and within the limits of that section, an insurer may join in his answer a defense that the insured has not performed a condition precedent as to arbitration or appraisal of the amount of the loss, with other defenses which, if successfully maintained, would discharge the insurer from liability altogether."

To the same effect is

Fire Association vs. Agresta, 115 O. S. 426, 430.

The majority of the Circuit Court of Appeals therefore has committed clear and prejudicial error in dis-

posing of the appraisal defense on the erroneous a
sumption that "the defendants denied liability befo
suit was brought and *after it was* brought".

Conclusion.

It is, therefore, respectfully submitted that this ca
is one calling for the exercise by this Court of its s
pervisory powers in order that conflicts between dec
sions of various circuit courts of appeals, and betwe
the decision of the majority of the Circuit Court
Appeals in the instant case and the decisions of th
Court be avoided, and to that end that a writ of ce
tiorari should be granted, and that this Court shou
review the decision of the Circuit Court of Appe
for the Sixth Circuit in this case and finally rever
said decision.

ROLLAND M. EDMONDS,
Counsel for Petitioner.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

October Term, 1930.

Sun Insurance Office,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 28

Norwich Union Fire Insurance Society, Ltd.,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 29

The Home Insurance Company of New York,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.

No. [illegible] 30

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ROLLAND M. EDMONDS,
Counsel for Petitioner.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

October Term, 1930.

Sun Insurance Office,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.
No. 779.

Norwich Union Fire Insurance Society, Ltd.,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below,
No. 780.

The Home Insurance Company of New York,
Petitioner and Appellant Below,
vs.
J. M. Scott,
Respondent and Appellee Below.
No. 781.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OHIO CODE SECTION 9586 HAS NOT BEEN CONSTRUED IN OPPOSITION TO THE ABOVE FEDERAL DECISIONS, AND IN NO EVENT WOULD BE CONTROLLING ON THIS QUESTION, WHICH IS ONE OF GENERAL JURISPRUDENCE.

It is asserted (plaintiff's brief) that Ohio Code Section 9586 has been construed by the Ohio Supreme Court as expanding the authority of local agents beyond the limitation of authority contained in the insurance contract, which confines the agent's authority as to waiver or modification of the contract, to such waiver or modification as is endorsed in writing on the policy, and it is claimed by the plaintiff that such construction of the statute appears in the decisions of the Ohio Supreme Court in Hartford Fire Ins. Co. v. Glass, 117 O. S., 145, and Foster v. Insurance Co., 101 O. S., 180. We submit that these assertions by plaintiff's counsel are wholly inaccurate.

In the Foster case this statute in fact is not mentioned at all in the court's discussion of the effect or validity of the non-waiver clause of the policy and in the court's discussion of the extent of the authority of the agent. On the contrary the statute is solely mentioned in that case as sustaining the finding of the trial court on the issue as to whether Grigor was in fact the agent of the company or not, and is not mentioned at all in the court's

discussion of the **extent of the agent's authority.** In that case the insurance company made two separate contentions (1) That Grigor (who knew the violation of the condition) in that case was not the agent of the company in the transaction, and (2) That if Grigor was the agent of the company his knowledge could not operate to bind the company to a change of the policy conditions because to change the contract by anything short of written endorsement was beyond the agent's authority.

That the court's only mention of Section 9586 in the Foster decision was as tending to support the trial court's finding of the **fact of agency** and not **as to the extent of authority,** is clear from page 186 of the opinion, where the Supreme Court says:

> "It follows that the undisputed evidence was ample to support the conclusion of fact that Grigor is to be taken as the defendant's agent in procuring the insurance contract with reference to plaintiff's property. This conclusion is fortified by the provisions of Section 9586, General Code."

The court having thus determined that Grigor in that case was the agent of the company then proceeds on the second question involved, namely, the extent of Grigor's authority, and decides that question without any reference whatever, and without any construction whatever, of the statute.

The Foster case in fact, therefore, is simply a holding that the effect of the statute is to create an agency relation where none might otherwise exist and that the stat-

ute has no effect whatever upon the question of the extent of the authority of the agent, or whether his knowledge will be binding upon the company.

In the case of Glass v. Insurance Company, 117 O. S., 145, also cited by plaintiff as construing this statute, the statute was not mentioned,—far less, construed,—as contended by plaintiff.

In the Foster decision the law of Ohio was again restated to the effect that the limitation of the agent's authority contained in the policy is binding, and precludes waiver or estoppel by knowledge or statements of the agent after the policy is issued. Upon this ground the Ohio Supreme Court distinguishes its previous decision in **Ohio Farmers Ins. Co. v. Titus**, 82 O. S., 161, and re-affirms that case, where the claimed knowledge of the agent was after the policy was issued. As the Supreme Court says of the Titus case in the Foster decision, opinion pages 193-194:

> "There is nothing in the report of the Titus case to indicate that there was any breach of the stipulations of the policy at its inception, that is, at the time the policy was issued, much less that the company's agents had knowledge of such breach. When the insured received the policy and paid the first premium he obtained a policy which actually insured the property in question. Moreover, upon delivering the policy and receiving the initial premium, the functions of the company's agent ceased, so far as their apparent scope was concerned. If further power was to be attributed to the agent, it could only be found in some express authorization by the company in the policy or elsewhere. The terms of the policy itself negatived the existence

of further powers in the agent. Hence notice by the insured to the agent of any subsequent encumbrance placed upon the property insured could not be imputed to the company, for obvious reason that the agent's knowledge was obtained at a time when he had ceased to have any duty to perform with respect to the property or insurance in question, and no longer possessed power real or apparent with respect thereto.

"It must therefore be seen that the Titus case does not control the decision of the case at bar, and is in no sense in conflict with the principles of law herein declared."

If, as plaintiff contends, the Ohio statute, 9586, has been construed as nullifying the contract limitation of agent's authority, then such limitation of authority should equally be nullified as to acts, statements or knowledge of the agent after the policy is issued as before. Yet the Ohio Supreme Court in the above case has held squarely that the limitation of authority in the policy is binding as to what occurs after the policy is issued notwithstanding the statute.

Plaintiff's claim that the Ohio Supreme Court has construed the statute as nullifying the contract limitation of agent's authority is therefore clearly not well taken.

Even if the Ohio courts had construed the statute as contended by plaintiff, this would not aid the plaintiff to escape the binding effect of the decisions of the United States Supreme Court on this question of general jurisprudence as to how the terms of the insurance contract shall be modified or waived, which, because it is a ques-

tion of general jurisprudence, is governed by the federal decisions and not by the state decisions. As held by the Sixth Circuit in **Hartford Fire Insurance Co. v. Nance**, 12 Fed. (2) 575, 576 (re-affirmed by this court in Insurance Co. v. Jones, 15 Fed. (2), 1.):

> "What we must finally determine is not a matter of validity or interpretation; it is whether the terms of a written contract—where the contract itself prohibits modification except in writing—may be varied by parol evidence for the purpose of asserting estoppel. This, we think, is a matter of general jurisprudence."

No question of "rule of property" or of "public policy" or of "comity between states" is here involved, but solely the question, as stated by the court in the language thus quoted from the Nance decision, as to whether the terms of a written contract, where the contract itself prohibits modification except in writing, may be varied by parol evidence for the purpose of asserting estoppel. The decisions cited by plaintiff on the question of "rule of property," "public policy" and "comity between states" are therefore wholly irrelevant.

To the same effect are: **Carpenter v. The Providence Washington Ins. Co.**, 41 U. S. (16 Peters) 495, 511, 512:

> "if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

Aetna Life Ins. Co. v. Moore, 231 U. S., 543, (see Syllabus and page 559).

True, as stated in plaintiff's brief, it is necessary for foreign insurance companies to obtain licenses to do business in Ohio. But it does not follow from this fact that a Federal Court will not follow Federal Court decisions on a question of general jurisprudence, such as the question here involved. Licenses to foreign companies to do business in a given state had been granted in every case where the Federal Courts have adhered to their own decisions on such questions of general jurisprudence.

These insurance companies by becoming licensed to do business in Ohio never submitted themselves to any other rule than the rule of the Federal Courts on this point of general commercial law, in any case and as to any contract where the Federal Courts had jurisdiction. The suggestion of plaintiff to the contrary is clearly without merit, as the Supreme Court of the United States held in **Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.**, 129 U. S., 397, 443:

> "* * * it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. Railroad Co. v. Lockwood, 17 Wall, 357, 368; Myrick v. Michigan Central Railroad, 107 U. S., 102; Carpenter v. Providence Washington Inc. Co., 16 Peters, 495, 511; Swift v. Tyson, 16 Pet., 1; Railroad Co. v. National Bank, 102 U. S., 14; Burgess v. Siligman, 107 U. S., 20, 33; Smith v. Alabama, 124 U. S., 365, 478; Bucher v. Cheshire Railroad, 125 U. S., 555, 583."

All of the cases cited in this connection in plaintiff's brief are cases in which the only question involved was the construction or validity of various provisions of the contracts. In none of them was the question involved as to whether the terms of a written contract, which by its terms prohibits modification except in writing, may be varied by parol evidence for the purpose of creating an estoppel. These cases therefore are entirely consistent with the decisions cited in our opening brief, pages 44-45. The cases cited by plaintiff therefore do not aid the plaintiff's contention.

Agency statutes, similar to Ohio Code Section 9586, relied upon by the plaintiff, have been repeatedly held by this court, and all other Federal Courts, not to have the effect claimed for by plaintiff of enlarging the authority of the agent as defined by the written policy of insurance.

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S., 613:

> "The designation as agent of an insurance company, made by Florida General Statute Section 2765, of any person who in any wise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, does not affect the true relationship to the parties to a life insurance contract of the local manager, soliciting agent, and local medical examiners, who were in fact designated agents of the company, with power to bind it within their apparent authority, and their knowledge of the falsity and fraudulent character of material representations by the insured in the application, which is made an essential constituent of the policy, is not the knowledge of the company, and does not estop it to rely upon such

misrepresentation as a defense to an action on the policy."

Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power.

In construing this Florida statute, the United States Court of Appeals of the Fifth Circuit (Florida), in Maryland Casualty Co. v. Campbell (decided 1919), 255 Fed. 437, 441, holds:

"That statute does not have the effect of conferring power which the contract of the parties shows was expressly withheld. Though each of the persons who according to the plaintiff's testimony was informed of the falsity of his statement that he had not received medical attention was an agent of the defendant, he was an agent from whom, by the terms of the contract entered into, the principal withheld any authority to change the contract or to waive any of its provisions and notice to whom or where knowledge it was stipulated should not be held to effect a waiver or change in the contract."

Stipcick v. Metropolitan Life Ins. Co., 8 Fed. (2) 285, (Or. 1925):

"Section 6435, Oregon laws, which provides that one who solicits and procures an application for life insurance shall be regarded as an agent of the company, does not fix the scope of such agent's authority and does not raise a special agent with limited authority to a general agent."

Fidelity-Phenix Co. v. Handley (C. C. A. Fla. 1924), 296 Fed., 902:

P. 904: "It is said, however, that as Jacobs was the agent of the company, the Florida statute (Section 4256, Rev. St.), brings home to them the knowledge communicated to him. The same question involving the same statute was before the court in Maryland Casualty Co. v. Campbell, 255 Fed., 47, where quoting from Mutual Life Co. v. Hilton-Green, 241 U. S., this court said: 'That statute does not have the effect of conferring a power which the contract of the parties shows was explicitly withheld.'"

ANY ERROR MAY BE PRESENTED BY PETITION FOR WRIT OF CERTIORARI.

Plaintiff assumes that the only ground for this petition for writ of certiorari is conflict between Courts of Appeal, and further assumes that the only question which this court can consider is a question as to which there has been such conflict.

The petition for the writ in this case on its face shows that other grounds in addition to that of conflict between Courts of Appeal are urged for the granting of this writ. Rule 38, Subdivision 5 of this court expressly recognizes all of the grounds in addition to the ground of conflict of decisions which are set forth in our petition for writ of certiorari, and this court is therefore not limited, as plaintiff contends, to a consideration of questions involved in conflict between Courts of Appeal.

NONPERFORMANCE OF THE CONDITION PRECEDENT REQUIRING APPRAISAL AS TO THE AMOUNT OF THE LOSS.

The suggestion is made by the plaintiff that he was absolved from performance of condition precedent as to appraisal of the amount of the loss because the wool in question was totally destroyed.

Even if personal property is totally destroyed, this does not excuse the failure of the plaintiff to perform the condition precedent requiring appraisal. This is settled law.

Thus in Insurance Company v. Carnahan, 19 Ohio Circuit Court, 114, the Circuit Court held that the fact that the personal property in question was totally destroyed excused the plaintiff from obtaining an appraisal or offering so to do. However, the judgment of the Circuit Court on this point was reversed by the Ohio Supreme Court in **Insurance Company v. Carnahan**, 63 O. S., 258, where final judgment was rendered in favor of the insurance company on the ground of failure by the insured to perform the condition as to appraisal, notwithstanding the loss to the property in that case was total. The Supreme Court thus in the Carnahan case squarely settled the proposition that the fact that the loss to personal property is total does not excuse the insured from complying with the appraisal condition.

In **Royal Ins. Co. v. Ries**, 80 O. S., 272, 288, the Su-

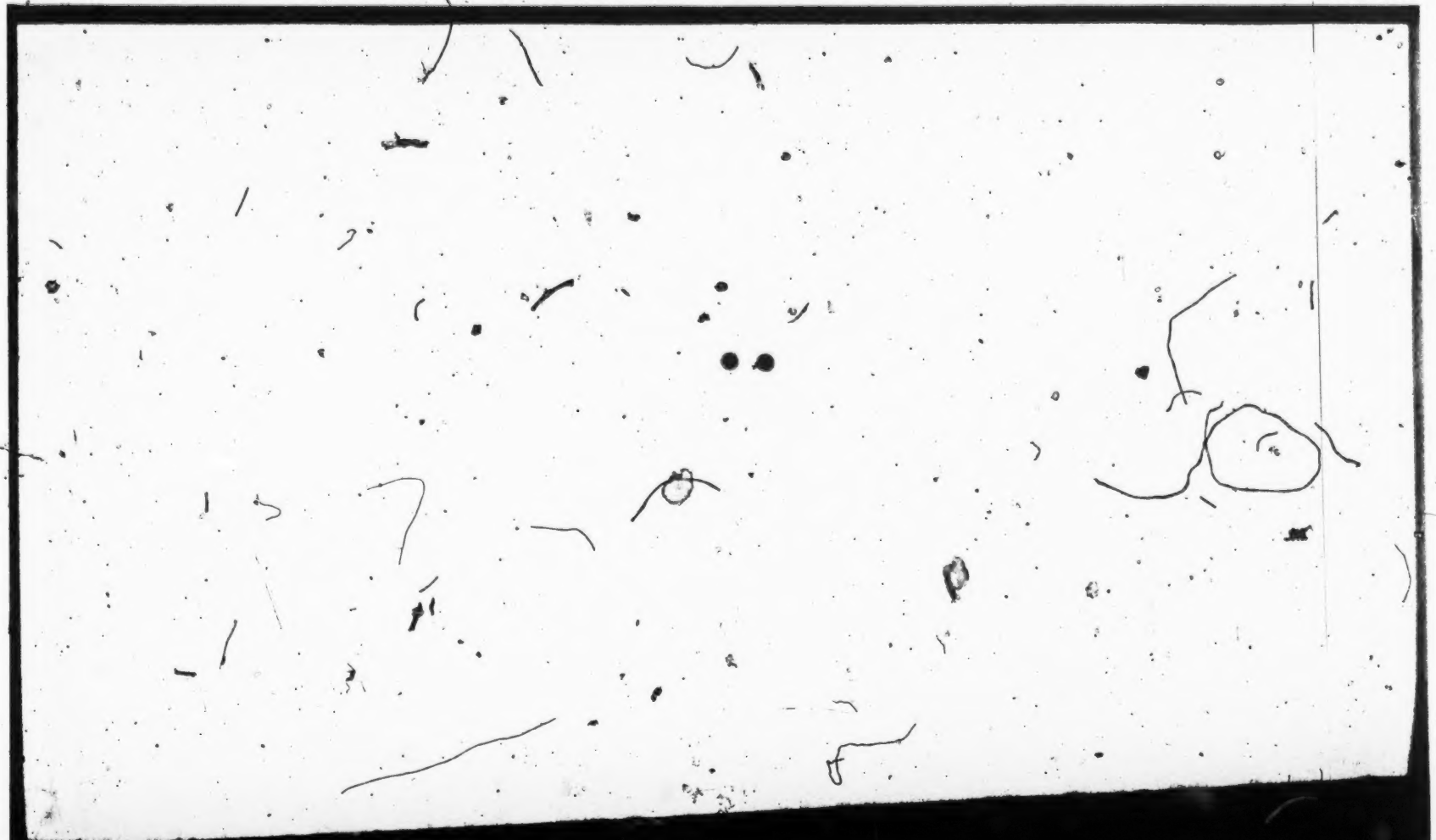
preme Court again held that the fact that the perso
property or a large part thereof was completely
literated by the fire in no wise invalidated or affec
the validity of the condition precedent requiring
praisal in case of disagreement. The language of
court in this connection is as follows:

> "The appraisers together inspected what was
> of the property, old junk or salvage they termed
> and agreed as to its value. The umpire was
> required to appraise what they could not agree up
> and as what they did not agree upon was not in
> istence, his failure to inspect the place of the
> did not warrant the court in setting aside the
> praisement."

Respectfully submitted,

ROLLAND M. EDMONDS,

Counsel for Petitioner.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Sun Insurance Office,
Appellant,
vs.
J. M. Scott,
Appellee.
No. ~~[illegible]~~ 28

Norwich Union Fire Insurance Society, Ltd.,
Appellant,
vs.
J. M. Scott,
Appellee.
No. ~~[illegible]~~ 29

The Home Insurance Company of New York,
Appellant,
vs.
J. M. Scott,
Appellee.
No. ~~[illegible]~~ 30

BRIEF OF RESPONDENT AGAINST PETITION FOR WRIT OF CERTIORARI OF PETITIONER.

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TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

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Sun Insurance Office,
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J. M. Scott,
Appellee.
No. 781.

BRIEF OF RESPONDENT AGAINST PETITION FOR WRIT OF CERTIORARI OF PETITIONER.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a brief of J. M. Scott, respondent and appellee below in the consolidated cases of The Home Insurance

Company of New York, Sun Insurance Office and Norwich Union Fire Insurance Society, Ltd., Numbers 5275, 5278 and 5279 respectively, in the United States Circuit Court of Appeals, and all involving the same questions of law, so far as applies to the petition for writ of certiorari from the United States Circuit Court of Appeals to the United States Supreme Court.

This brief being an answer brief to the brief in common for the three appellants as fully appears in the summary of statements of the appellants in their consolidated brief, being a duplicate, and all cases raising the same questions.

The petition for writ of certiorari appears on page 1 to page 12 of counsel's brief herein in this court.

The status of the appellants in the state of Ohio is that each of said appellants are non-resident corporations exercising the functions of an insurance company in the state of Ohio, purely by the grace of certain statutes, granting said franchises to said foreign corporations. That the contracts complained about were all made in the state of Ohio after said companies filed its waivers with the insurance commissioner obtained their license to do business as a domestic corporation, and the suit was begun in the state courts to enforce the said contract under the said license requiring the companies to comply with the state laws and waiving the conditions of their contracts that in any wise contravened the state statutes.

That said appellants gained no rights by transferring to the federal court against the appellee, that were not available to the appellee, in the state courts.

A.

The insurance contracts were all intrastate contracts. There were no issues under the federal acts or federal decisions available to them that applied to them, (1), to interstate commerce; (2), any question of taxation; (3), any question of the United States mails; (4), any question of the constitutionality of any of the statutes under which they were acting.

Therefore, there was only one issue left for the application of this writ, to wit, was there a conflict between the decision of the United States Court of Appeals of the Sixth Federal District that had not been decided?

It is apparent from the brief of counsel for the appellant that they are lugging into this case under guise of a petition for writ of certiorari many issues that are wholly beyond the jurisdiction and functions of said writ.

First the waiver.

Section 644, General Code of Ohio, which this court takes judicial knowledge of the licensing of agents, provides as follows:

> Agent's license: "While such license remains in force, a foreign company shall be bound by the acts of the person named therein within his apparent authority as its acknowledged agent."

Section 9586, General Code of Ohio, also pertains to a solicitor agent of the company, as follows:

> Solicitor agent of company: "A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company, or association, thereafter issuing a policy upon

such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding."

In the case at bar, the record shows, and the pleadings admit, that the Ohio agent of the three appellants located at Cumberland, Ohio, was one and the same, and that he was not a solicitor in the limited sense argued in the brief, because, he was a statutory agent and countersigned the policies themselves, upon which application the policies were issued and the premiums paid and received and held.

This eliminates all the objections that counsel for the appellants has been trying to inject in this case from the beginning of the trial to the end, treating it as though it was superior to the laws of the state of Ohio, and as though it involved some laws pertinent to the mails, or to taxes, or to interstate commerce.

If your honorable court follows the doctrine that our federal court and the Court of Appeals have followed, to wit, under this domesticated company, with their waivers, the questions relied upon by counsel in their single cited case, to wit, Atlas Reduction Company v. New Zealand Insurance Company, 138 Fed., 497, this case will not avail them.

We call the court's attention to the consideration the highest court of the state of Ohio gave when passing upon the provisions of said Section 9586, General Code of Ohio, to wit:

"The company is bound by the mistakes of a soliciting agent who does not fill up an application as directed by the applicant."

Insurance Company v. Williams, 39 O. S., 584.

"Stipulations in policy that the agent is agent of assured, are void."

Insurance Company v. Leslie, 47 O. S., 409.
Dayton Ins. Co. v. Kelley, 24 O. S., 345.

"An insurance company is liable upon an oral insurance contract made by its agent on its behalf, notwithstanding that the policy issued by the company varies, without the knowledge of the insured, from the contract made between the insured and the agent."

Insurance Company v. Houck, 32 O. C. A., 429.
Motion to require Court of Appeals to certify the record, denied by the Supreme Court on May 23, 1922.

"Under Section 9586, G. C., solicitor of insurance procuring application on which policy is later issued by insurer is agent of insurance company, which is presumed to know and ratify acts and conduct of solicitor by execution and delivery of policy."

Mechanics' & Traders' Ins. Co. v. Himmelstein, 24 Ohio App., 29.

These statutes and similar statutes all are sustained by this court, notwithstanding similar statutes are provided for intrastate business by the grace of sovereignty and they are obliged to submit to our statutes and the decisions of the courts are part of the statutes.

The highest court has construed this statute also in the case of Foster v. Scottish Union & National Insurance Company of Edinburgh, 101 O. S., 180, in Syllabi 1, 2, 3 and 4.

This case was fully considered again in The Hartford Ins. Co. v. Glass, 117 Ohio St., 145, to wit:

"Chattel mortgage existing when policy issued, but consent not indorsed thereon — insurer liable where agent had knowledge of incumbrance."

On page 146 of said case it is held by the court:

"The principal question presented in this case is whether the existence of a chattel mortgage upon a portion of the personal property covered by this insurance policy wholly relieves the insurance company from liability thereunder, when in fact the agent of the company who procured the insurance prior to and at the time of the issuance of the policy had full knowledge respecting such incumbrance, but failed to have consent thereto indorsed upon the policy.

"Substantially the same question was considered and decided by this court in the case of Foster v. Scottish Union & National Ins. Co., 101 Ohio St., 180, 127 N. E., 865, and that decision, unless it is to be overruled, requires an affirmance of the judgment of the Court of Appeals. There is the same distinction between this case and Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St., 161, 92 N. E., 82, as was pointed out by the court in the Foster case, and the reasoning of the court in the latter case is applicable and persuasive here.

"The recent case of Michigan Automobile Ins. Co. v. Van Buskirk, 115 Ohio St., 598, 155 N. E., 186, is distinguished from the Foster case, as pointed out in the opinion, and may likewise be distinguished from this case in that the existance of the chattel mortgage was not known either by the company or its agent when the policy was issued."

Our Supreme Court is in harmony with the numerous authorities of your honorable court on this proposition.

We cite the court to the case of The Great American Mutual Indemnity Co. v. Jones, 111 O. S., 84.

His Honor, Chief Justice Taft, in the case of National Union Fire Ins. Co. v. Wanberg, 260 U. S., 71, on page 75, speaks of the requirements of state statutes, and announces the doctrine:

> "that requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the state is a circumstance necessarily incident to their conduct of business in another state, of which they cannot complain. They cannot expect the laws of the state to be bent to accommodate them, as a matter of strict legal right, however, wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate the state has power to require them to accept conditions different from those imposed on domestic corporations."

New York L. Ins. Co. v. Deer Lodge County, 231 U. S., 495.
Paul v. Virginia, 8 Wall., 168.
Hooper v. California, 155 U. S., 648.
Whitfield v. Aetna L. Ins. Co., 205 U. S., 489.

The doctrine in state and federal authorities has always been that where a contract of foreign corporations or even a domestic corporation, that is in anywise recognized by constitutional statutes, they cannot be abrogated by conditions in the contract in such states. As the courts happily express the doctrine, even such pertinent

statutes is by implication of law written in the contract. And any language contravening such statute is a nullity.

See the case of Union Trust Company v. Minnie K. Grosman, 245 U. S., 412.

> "In every forum a contract is governed by the law with a view to which it is made, because, by the consent of the parties, that law becomes a part of their agreement; and it is, therefore, to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated."
>
> Eliza D. Pritchard, etc., v. Ex. Norton, 106 U. S., 124, Syllabus 2.

Justice Stone announced an opinion in the case of Stipcich v. Metropolitan Life Insurance Company, 277 U S., 314, Syllabus 5:

> "If provisions in an insurance policy are with equal reason open to two constructions, that most favorable to the insured will be adopted."

On top of page the court announced the doctrine:

> "Narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted."
>
> Mutual L. Ins. Co. v. Hurni Packing Co., 263 U. S., 167, 31 A. L. R., 102.
> American Surety Co. v. Pauly, 170 U. S., 133.

"A state may prohibit a foreign insurance company from doing business within its limits without

first complying with conditions prescribed by it, and may refuse the aid of its courts in enforcing a contract which involves violation of its laws."

James W. Bothwell, etc., v. Buckbee, Mears Co., 275 U. S., 274, and Judge Brandeis rendered the opinion.

B.

The reasons relied upon for the allowance of the writ must stand or fall upon the divided court in the case of Atlas Reduction Co., etc., v. New Zealand Ins. Co. of New Zealand, 138 Fed., 497, which will hereafter be referred to as the Atlas case. This case is discussed under appellant's subdivisions 8, 9, 22, 23, 24, 29, 31 and 39.

Two judicial giants, Judge Van Devanter and Judge Hook, then sitting in the Circuit Court of Appeals of the Eighth District on April 24, 1905, some twenty-six years ago, considered the Atlas case referred to. Search of the records finds this case to be reported in 9 L. R. A. (N. S.), 433. A footnote in that standard record of cases says:

"A thorough search has failed to disclose any other cases on the question what will amount to a written indorsement of consent to an encumbrance upon insured property, within the meaning of a policy requiring such consent to be in writing."

Upon thorough search I find this question acutely before the Circuit Court of Appeals in the case at bar from the Sixth District, and appears on page 227 of the record in the majority opinion in this case and again on page 241 of the record in the minority or dissenting opinion of Judge Killits.

The three policies in the consolidated cases at bar contained riders set forth in the record at various places and in the pleadings and again in the record on page 227 of the opinion. The pleading of the appellants in the original action sets forth in the answer to the second amended petition on page 36 the following admissions:

> "This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact as the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to or an interest in said wool or a part thereof located in said building at the time of said fire."

That concession of pleading admits that The Cumberland Savings Bank of Cumberland, Ohio, had an interest in said policy and the rider is in accordance with the provisions of the policy itself, requiring notice in a rider so attached to the policy, that there is another party than the original insured that has an interest in said contract. The two provisions (1) requirement of the policy, and (2) fulfillment of the requirement as to interest of lien, these are set forth on page 21 of the record which is as follows:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other

than unconditional and sole ownership; or if the subject of insurance be * * * personal property and be or become incumbered by a chattel mortgage."

"Loss Payable Clause"

"Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, agency. Dated June 24, 1926."

So, the language of the policy, in using the words "unless otherwise provided by agreement indorsed hereon or added hereto" require nothing further or more than when the company itself, under the full powers of the Ohio agent who countersigned the policy and accepted the premiums and had knowledge of the chattel mortgage, inserted in the rider "Any loss under this policy that may be proved due the assured shall be payable to the assured and the Cumberland Savings Bank Co., Cumberland, Ohio." That was either a clear and clean notice that the company had an interest and that the assured was not the sole and unconditional owner, or if it would be a doubtful clause or expression in the contract that would be susceptible of offering proof of the language used by the contracting parties which was admitted in evidence in what sense the terms were used and in what sense the agreement was used, because of this full power given to the agent under the Ohio statutes. And then,

applying the doctrine that is in dispute that the terms of the policy should be, if ambiguous, construed against the insurer who furnished the forms of the rider.

In the two cases cited on page 227 of the majority opinion known as Commercial Union Fire Insurance Co. v. Marshall case, 18 Fed. (2d), 457, and Firemen's Insurance Co. v. Brooks, 32 Fed. (2d), 451, by unanimous opinion by this court sustained Judge Hough and sustained the Court of Appeals in the three cases at bar, that such a notice in the rider was tantamount to an indorsement in accordance with the provisions of the policy permitting an encumbrance of the property.

"As the interest may appear" was not a statement made to a mere solicitor, but, was advice and knowledge given to the company itself under the statutory definition of an agent who had the right and did exercise the privilege of writing the policy itself and accepting the money for the premiums. It eliminates these three cases from the long and tedious differentiating "an agent" from "a solicitor."

Counsel for the appellants, notwithstanding the statutory authority given an Ohio agent and construed by the Ohio courts, still, calls J. M. Bracken, the agent writing these policies, "a solicitor."

Counsel for the appellants also complains that because the obiter dictum in the Atlas case laid stress upon the fact that there was no "custom" alleged or proven as to what language was used in the case when a chattel mortgage was the lien in question authorizing this generic form used as in the case at bar. That is not the issue

in the case at bar in these policies, for the reason that this was not a solicitor, it was the company itself represented under a license agreeing to comply with the Ohio statute and not invoke any federal question that would in anywise exercise the power of cancelling the conditions upon which this company itself entered Ohio, and when the agent appointed under the Ohio laws used this form of rider on the same state of facts in which there was a chattel mortgage, defective as it was, upon this wool or the property insured, and then with that information used three successive riders using the same language, protecting the insurer as well as the insured and validating the policy with such a lien as the record shows was given upon said property by a defective chattel mortgage to the Cumberland Savings Bank Co.

Therefore, the trial court as well as the appellate court was justified in treating that, if such requirement, as a custodian in this particular locality, and to come to the conclusion as that the majority of the opinion of the court indicates on page 227, that this agreement was fully complied with where they attached in each case this rider contract.

Therefore, the two propositions of the majority opinion, as appears on page 228 of the record, seems to be entirely justified, namely, "that if there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is at least not clear that the language used might not have been intended to refer to that very interest which Trimby

in fact had in the property and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." In this case it clearly appears that the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage. They are sufficiently comprehensive, for that purpose, and being so intended, they seem to us to be quite as effective as they would have been had they contained the further phrase "as interest may appear."

And if the court adverts to the concession in the pleadings above cited in the answer to the second amended petition as well as to the first amended petition, the company have put the same construction upon this rider that the company put upon it in its pleading.

C.

As to the proposition argued in the brief for a writ of certiorari, counsel further complains because Bracken was in a dual capacity in representing both the Cumberland Savings Bank and the insurance company in this deal.

That is a novel proposition to inject into this case, for they selected their own agent who was publicly known and was cashier of the bank, and if they had an agent who was not protecting the rights of the company because of that dual agency, in the language of modern slang, "that was too bad." But they should not be doing a business of this importance with an agent they could not trust. They should pursue their remedy against

the alleged defaulting agent, because the statute as against us forestalls any such construction to his agency. The statute vouches for his potency in this contract, and they cannot be heard as against us to raise any such question.

That issue was not in the Atlas case, and therefore would not avail them in this discussion.

Point I (p. 48). Surely this is not a ground for this petition for writ of certiorari as against us! If they are using a contract of their own invention that they cannot understand, they should not punish the insured by asking the delay and expense of going to the United States Supreme Court to tell them what kind of a rider clause they should attach to their policy when they have the full power of drawing the terms and have the facts of the mortgage lien when they so attached the rider. That is a novel proposition to bring before this honorable court.

Point J (p. 49). Surely this has no place in this petition for writ of certiorari, for it in nowise was involved in the Atlas case. It doesn't make any difference so far as that point is concerned whether the trial court who decided the question on the weight of the testimony and the Court of Appeals affirmed the judgment on the weight of the testimony, therefore, it is an issue raised in the testimony of the trial court as an ordinary law suit that has no business being injected in this case. And we do not believe it requires a discussion.

The record showed that there was proof offered that there was an entire consumption of the wool, that there

was no salvage. And although Harrod, the adjuster, was present he did not take the stand and deny the overwhelming proof in the trial court of the total destruction of the property (pages 66 and 67 of the Record).

It is not a constitutional question or a question of the mails or nowise a federal question, but is a trial upon an Ohio contract before an Ohio jury and upon Ohio evidence and decided by Judge Hough in his overruling the motion asking judgment for plaintiff on statement of counsel, overruling the motion at the close of plaintiff's evidence, overruling the motion at the close of defendant's evidence, overruling the motion for a new trial, overruling a motion for a rehearing, and the Court of Appeals sustained the trial court and the Court of Appeals in refusing a rehearing.

We confidently think the writ of certiorari is raising simply a moot question that is not cognizable in this court.

Said appellants have or had their day in court, both federal and state, in which they have tested out some nine times this same issue and every time have been politely and patiently listened to and then rejected.

THE LOSS-PAYABLE CLAUSE RIDER.

Point A.

The provision of the policy allowing liens or interest of third parties in the insurance fund complied with.

The insurance contract expresaly provides:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be

void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

It was proven "otherwise by agreement and endorsed in the rider" to whom the insurance money in case of fire should be paid to. Therefore, the rider protected the insured. This agreement was made by the company itself, with the knowledge of the existing bank's lien, furnished by the construction of the provisions of a statutory agent. See Section 9586, General Code of Ohio, construing The Hartford Fire Ins. Co. v. Glass, 117 Ohio State, 145, and other authorities cited.

Point B.

The appellants were foreign corporations to the state of Ohio, and licensed to do business under the Ohio statutes. See the case of National Ins. Co. v. Wanberg, 260 U. S., 71.

The business of insurance companies is not interstate commerce, but purely an intrastate transaction, governed by the local law.

Hooper v. California, 155 U. S., 648, 652.
Miller v. Maryland Casualty Co., 193 Fed., 343 (113 O. C. C. A., 267).
Hancock Mutual Life Ins. Co. v. Warren, 181 U. S., 73.
New York Life Ins. Co. v. Deer Lodge County, 231 U. S., 495.
Orient Ins. Co. v. Daggs, 172 U. S., 557.
New York Life Ins. Co. v. Cravens, 178 U. S., 389.

Point C.

The validity and construction of a contract depends upon the applicable statutes and decisions of a state in which the contract is made or to be performed.

Union Trust Co. v. Grosman, 245 U. S., 412.
Pritchard v. Norton, 106 U. S., 124.

Point D.

The insurance business is affected with a public interest, and the state in which insurance contracts are written and to be performed has the right to regulate and control that business, whether it be conducted by a foreign or domestic corporation.

National Ins. Co. v. Wanberg, supra.
German Alliance Ins. Co. v. Lewis, 233 U. S., 389.
Waters-Pierce Oil Co. v. Texas, 177 U. S., 28.

Point E.

A state can do with foreign corporations what it may do with corporations of its own creation.

Hancock Life Ins. Co. v. Warren, 181 U. S., 73.
National Ins. Co. v. Wanberg, 260 U. S., 71.

Point F.

Even an express agreement in the application or the policy cannot avoid the law of the state in which the policy is written.

National Ins. Co. v. Wanberg, supra.
New York Life Ins. Co. v. Cravens, 178 U. S., 389.
Mutual Life Ins. Co. v. Hill, 193 U. S., 551.

Point G.

In the case relied upon by appellant in his entire argument (Atlas Reduction Company v. New Zealand Ins. Co., 138 Fed., 497-508), the said statutes and said decision under the statutes were not involved. Therefore, are not to be considered as a contra case, and no discussion of the statutes were involved.

Point H.

Construing Section 9586, General Code of Ohio, the highest court of the state holds, that a person who solicits insurance and procures the application therefor shall be held to be the agent of the company issuing the policy, anything in the application or policy to the contrary notwithstanding.

Foster v. Scottish Union, 101 Ohio St., 180 (127 N. E., 865).

The company's agent in this case knew appellee's business and knew that he paid cash to firms and to various persons for said wool, and that he was required to secure credit from the bank, and knew that there was a chattel mortgage.

The Ohio Supreme Court in the Foster case, supra, held that, where the company's agent had full knowledge of the assured's title to the property, and with such knowledge and on behalf of the company issued the policy and accepted payment of the premium, the company was estopped to assert as a defense to its liability on the policy that the insured was not the absolute owner in

fee simple of the property insured. In construing and applying Section 9586, General Code of Ohio, the court further held that under its provisions a person who solicits insurance and procures the application therefor is the agent of the company, that the knowledge of such agent is the knowledge of the company, and that plaintiff could recover, notwithstanding a clause in the policy provided that "no officer, agent, or other representative of this company shall have power to waive any condition or provision of this policy, except by agreement indorsed hereon or added hereto." This Ohio statute was in force and this decision was announced some year prior to the writing of the policy in suit. Necessarily the law of Ohio, as construed and applied by the court of last resort of that state, entered into and became a part of this contract of insurance, the same as if it had actually been written therein.

Foster v. Scottish Union, 101 Ohio St., 180.

The laws of Ohio in this judgment is right, and was affirmed by the trial court and by the Circuit Court of Appeals, without requiring the defendants to bring suit in equity to reform his contract.

Point I.

This action was brought in the Ohio court. It was removed by the insurance company to the federal court upon the sole ground of diversity of citizenship. If the cause had continued to final judgment in the Ohio court, then, under the law and public policy of Ohio, as declared

by statute and the court of last resort of that state, the plaintiffs would have been entitled to judgment upon proof that the agent was fully informed as to appellee's title.

Point J.

If the judgment had been right in the Supreme Court of Ohio it would be right in the District Court of the United States, sitting in the same district of the same state.

Union Trust Co. v. Grosman, 245 U. S., 412.
Pritchard v. Norton, 106 U. S., 124.

Point K.

There must be uniformity in a state system of insurance, if domestic insurance companies must comply with the law and public policy of a state, and foreign insurance companies, in direct competition with the domestic companies cannot be permitted to avoid compliance with the Ohio laws by merely transferring the cause from the state court to the federal court on the sole ground of diversity of citizenship.

Miller v. Maryland Casualty Co., supra.

Point L.

The federal court will not compel the Ohio system of insurance as to foreign corporations on an intrastate contract to be operated upon other than a uniform system, under which foreign and domestic insurance companies will be liable alike and the policy holders equally protected, and the federal court has so held in the case of Miller v. Maryland Casualty Co., supra.

Point M.

This uniformity is not possible under the rule announced in the minority opinion in the case at bar that counsel is trying to sustain. The brief is not applicable in the Atlas case, supra, because these questions were not raised.

Point N.

Where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.

Insurance Co. v. Wilkinson, 80 U. S., 222, 223.

Point O.

It was first established by courts of equity, and has since been extended to courts of law.

McAfferty v. Conover, 7 Ohio St., 99.

Point P.

It will not be presumed that the insurance company, at the time it issued this policy, and inserted the rider, intended to insist upon this construction that made the policy worthless when issued, and accepted the premiums knowing it to be worthless.

Point Q.

Under the settled public policy of Ohio, and under the provisions of Section 9566, General Code of Ohio, and under the construction of said statute by the highest

court of the state of Ohio, as to the knowledge of the agent as to the title of the property insured is the knowledge of the insurance company he represents. The evidence showed the agent knew that the appellee was a wool dealer in and about small towns, that he borrowed his money by putting a lien on the wool in the warehouse and made a contract and attached a rider that covered that situation.

Point R.

It is said by the Supreme Court of the United States in Insurance Company v. Wilkinson, supra:

> "It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais."

The decision of the Ohio Supreme Court in Foster v. Scottish Union, supra, is based upon this principle, so clearly stated by the United States Supreme Court in Insurance Co. v. Wilkinson, and this has been uniform holding in Ohio.

Richards v. American Fire Brick & Clay Co., 69 O. S., 359.
Sidners v. Concrete Co., 13 O. C. C. R. (N. S.), 481, affirmed 87 Ohio St., 519.
Insurance Co. v. Roberts, 27 O. Cir. Ct. Rep. (N. S.), 10.

Point S.

No presumption obtains that parties to a rider purporting to be a valid contract were intending to do a vain

and foolish thing. The doctrine of estoppel, when the facts are fully known to the insurance company at the time the policy is issued, is not only consistent with modern ideas as to uselessness of barren technicalities in the administration of justice, but also consistent with the public policy to prevent a multiplicity of suits. The Ohio Code provides that there shall be but one form of action, to be known as a civil action. Many other states have likewise departed from ancient forms and useless distinctions that hinder, obstruct, and delay litigation to no purpose. Under the new Judicial Code of the United States the same doctrine now applies.

Liberty Oil Company v. Condon Bank, 260 U. S., 235.

United States v. Richardson, 223 Fed., 1010, 1013.

Point T.

Under the provisions of this act, a federal court now, if it did not before its passage, has the same jurisdiction as the Ohio state court to hear and determine the question of estoppel, without requiring the added expense and delay of a separate suit in equity to reform the contract.

Admissions in the answer to the second amended petition puts its own construction upon this rider, to wit, that the Cumberland Savings Bank Company of Cumberland, Ohio, had title to or interest in said wool or part thereof located in said building at the time of said fire.

Judge Hooks' opinion has been followed in the above cited authorities and is followed in the cases of Firemen's

Insurance Company v. Brooks, 32 Fed. (2d), 451, and Commercial Union Fire Insurance Company v. Marshall, etc., 18 Fed. (2d), 457.

As to the policies in the three consolidated cases with riders and providing that any loss occurring under the policy should be payable to the insured and the Cumberland Savings Bank Company of Cumberland, Ohio, is notice for all purposes and for all questions of liens.

The two decisions by the Federal Court in the case of Commercial Union Fire Insurance Co. v. Marshall, etc., 18 Fed. (2d), 457, and Firemen's Insurance Co. v. Brooks, 32 Fed. (2d), 451, it being under the Ohio law, it is held, that such a rider is a contract and allowed by the policy to be endorsed in accordance with the provisions of the policy permitting an encumbrance on the property. The Federal Court of Appeals in this case on page 227 of the record say "under the circumstances we do not think a legal distinction can be founded upon the absence of that phrase 'interest may appear' from these policies." Quoting Bates v. Equitable Insurance Company, 10 Wall., 33, and other authorities, and quoting the Atlas case with approval.

The question of the arbitration is not an issue in the petition for writ of certiorari. It is not involved in the contra case relied upon, Atlas case, supra, and if it did the opinion of the majority court is conclusive under the evidence uncontradicted, as appears on page 66 of the record, to wit, there it was conceded that there was an entire destruction of all property by the fire, and that is a

question for the lower court and the jury to determine and is not a question for the higher court.

The Atlas case, by the Supreme Court, in effect, has long since in the twenty-five years, been overruled, and the minority opinion of Judge Hook, both by the lower and higher courts seem to be approved.

CONCLUSION.

There is no diversity of opinion any longer in the federal court on this subject, therefore, it is a mere moot case and the court should not be called upon to instruct insurance companies how to write loss payable clauses without containing sleepers therein, or snares therein, to collect premiums off of the citizens of the state of Ohio.

This honorable court on March 16, 1931, denied application for review of the following two cases involving the interpretation of clauses of insurance policies, which in principle are authority as we construe it to deny this writ. See The Union Central Life Insurance Company v. Harvey, No. 717, and The New York Life Insurance Company v. Rositzky, No. 736, refusing a writ of certiorari on March 16, 1931.

Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 Fed. Rep. (2d Ed.), 626, Syllabi 10 and 13 are as follows:

> "Court has power of its own motion to transfer cause to equity and send it back for hearing in accordance with equitable rights of parties.
>
> Although Judicial Code, Sec. 274-a, Act March 3, 1915, 38 Stat., 956 (28 U. S. C. A., Sec. 397), authorizing amendment to pleadings in case of suit brought in equity, which should have been brought at law, or suit at law, which should have been brought in equity, does not abolish distinctions be-

tween actions at law and suits in equity, its purpose was nevertheless to end unseemly practice of turning litigant out of court because of failure to institute action on proper side.

Appellate court will transfer cause from law to equity or vice versa on its own motion, regardless of failure to properly raise question in lower court when otherwise failure of justice may result."

Then again on pages 633 and 634 the court held:

"While this statute does not abolish the distinction between actions at law and suits in equity, there can be no question that its purpose was to end the unseemly practice of turning a litigant out of court because he had come in at the wrong door." As said by Chief Justice Taft in Liberty Oil Company v. Condon Bank, 260 U. S., 235, 43 S. Ct., 118.

"It is said, however, that by instituting the action at law plaintiff has elected between its legal and equitable rights, and is estopped by such election from now asking that the cause be transferred to equity. This result would not follow in the situation here, even if the right of transferring to equity were not given by statute. See Northern Assurance Co. v. Grand View Building Ass'n, 203 U. S., 106, 27 S. Ct., 27, 51 L. Ed., 109. But the statute above quoted and the interpretation placed upon it in the case of Liberty Oil Co. v. Condon Bank, supra, would seem to have removed all doubt with regard thereto. There would be no sense in providing that an action erroneously instituted at law might be transferred to equity and proceeded with there, if instituting the action of itself amounted to an election of remedies and an abandonment of equitable relief."

JAMES JOYCE,
ELWOOD MURPHY,
F. S. MONNETT,
Counsel for Respondent.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 29

NORWICH UNION INSURANCE SOCIETY, LTD.,
PETITIONER,

vs.

J. M. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,702)

(35,702)

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TRANSCRIPT OF RECORD

In the District Court of the United States, Southern District of Ohio, Eastern Division.

J. M. Scott, Plaintiff,

vs.

Norwich Union Fire Insurance Society, Ltd. Defendant.

No. 2564.

TRANSCRIPT ON REMOVAL—Filed February 24, 1927.

In the Common Pleas Court of Guernsey County, Ohio.

J. M. Scott, Plaintiff, against Norwich Union Fire Insurance Society, Ltd., Defendant.

Petition.

Defendant is a corporation, incorporated under the laws of some other state, or foreign country, and at all the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

On the 14th day of June, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, and at least one hundred and forty-four (144) wool bags, contained in the two story, slate roof, frame building, occupied as wool storage, situated on the west side of Cambridge Street, in the Village of Cumberland, County of Guernsey and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 14th day of June, 1926, in consideration of $73.02, annual premium, paid by plaintiff, defendant, by its policy of insurance No. 223, insured plaintiff against loss by fire to the amount of $5750.00, on said unwashed wool and on said wool sacks from the 14th day of June, 1926, at noon, to the 14th day of June, 1927, at noon.

Plaintiff says there was other concurrent insurance on

the aforesaid property as permitted under the terms of said policy in the sum of $22,250.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, all the aforesaid personal property was totally destroyed by fire.

On or about the 6th day of September, 1926, and immediately after said loss, by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as next hereinafter stated, to wit: Said policy contained the following provision as a part thereof, to wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

After said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on the part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and at said time defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, as subject, nevertheless, to all the terms and conditions of

policy. Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, agency. Dated June 24th, 1926. J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay to plaintiff his loss as covered by said policy, or any part thereof, although requested so to do.

Wherefore, plaintiff prays judgment against defendant in the sum of $5750.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott.

By A. R. McCulloch,
W. W. Stewart and
James Joyce,
His Attorneys.

[Duly verified.]

Precipe.

To the Clerk of Courts: Issue summons to the Sheriff of Guernsey County, for the defendant, returnable according to law. Endorse thereon, "Action for money only, amount claimed $5750.00, with interest from September 6th, 1926, and for costs of suit."

A. R. McCulloch,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

Summons.

The State of Ohio, Guernsey County. Common Pleas Court—To the Sheriff of Said County:

You are hereby commanded to notify Norwich Union Fire Insurance Society, Ltd., that they have been sued by J. M. Scott in the Court of Common Pleas of said Guernsey County, and must answer by the 29th day of January, A. D. 1927, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said Sheriff will make due return of this summons on the 10th day of January, 1927.

Witness my hand and the seal of said Court, this 30th day of December, 1926.

[Seal.] Thomas H. Snider, Clerk.

Transcript of Removal.

Sheriff's Return.

The State of Ohio, Guernsey County.

Received this Writ Dec. 30th, 1926, at 11 o'clock A. M. And on ....., 192.., I served the within named Norwich Union Fire Insurance Society, Ltd., by personally handing a true and certified copy of this writ with all the endorsements thereon to J. M. Bracken, Agent of the Norwich Union Fire Insurance Soceity, Ltd.

There being no president or other chief officer found within my County. Sheriff's Fees, $4.59.

Ed W. Wilson, Sheriff.

By Thos. E. Gracy, Deputy.

Notice of Petition and Bond for Order of Removal.

To A. R. McCulloch, W. W. Stewart and James Joyce, Attorneys for Plaintiff:

Please take notice that the defendant, Norwich Union Fire Insurance Society, Ltd., will on Monday the 31st day of January, 1927, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of Ohio, Eastern Division, in accordance with the petition and bond of defendant, copies of which are hereto attached.

Dated 28th day of January, 1927.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

We acknowledge service upon us this 28th day of January, 1927, of the above notice, together with a copy of the petition and bond, for removal filed in the above case by the defendant, Norwich Union Fire Insurance Society, Ltd.

James Joyce and
A. R. McCulloch,
W. W. Stewart,
Attorneys for Plaintiff.

Petition to Remove.

The petition of the Norwich Union Fire Insurance Society, Ltd., the above named defendant, respectfully shows to this court as follows:

That your petitioner is the defendant in the above entitled action;

That the above entitled action is brought by the plaintiff to recover of this defendant petitioner the sum of $5750.00 with interest from the 6th day of September, 1926, upon a policy of insurance issued by this defendant

petitioner by reason of an alleged fire loss to property described in said policy;

That said action is wholly of a civil nature;

That the matter and the amount in dispute in said suit, exclusive of interest, exceed the sum of value of $3000.00, all of which will more fully appear in the petition in said action which is hereby referred to and made a part hereof;

That the controversy herein is between citizens of a state and of a foreign state;

That said defendant, Norwich Union Fire Insurance Society, Ltd., is a foreign corporation and was at the time of the commencement of said suit and still is a non-resident and not a citizen of said State of Ohio, but was then and still is an alien and a citizen and subject of the United Kingdom of Great Britian and Ireland, and was then and still is a corporation duly formed, created and organized under and by virtue of the laws of the United Kingdom of Great Britian and Ireland, and was then and still is a citizen and resident of said United Kingdom of Great Britian and Ireland, having its principal place of business in the City of Norwich, England.

That said plaintiff, J. M. Scott, was at the time of the commencement of said suit and still is a citizen and resident of the State of Ohio and of the County of Guernsey of said State of Ohio, in the Southern District of Ohio, Eastern Division of said State.

That there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner and the plaintiff;

That the time within which this defendant is required by the laws of the State of Ohio to plead or answer herein has not yet expired and your petitioner has not yet appeared or answered or otherwise pleaded in this action;

That your petitioner herein presents a good and sufficient bond and surety as provided by the statute in such cases, conditioned that this petitioner will enter into said District Court for the Southern District of Ohio, Eastern Division, within thirty days from the filing of this petition, a certified copy of the record in this suit and for the payment of all costs which may be awarded by said Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented

Transcript of Removal.

herewith, and direct a transcript of the record he
to be made to said Court as provided by law.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant, Norwich Union Fire Ins
Society, Ltd.

[Duly verified.]

Bond on Removal.

Know All Men By These Presents that the Norw
Union Fire Insurance Society, Ltd., as principal, a
The Great American Indemnity Company of New Y
a corporation, as surety, are held and firmly bound u
the above named plaintiff, J. M. Scott, his Executo
Administrators and Assigns, jointly and severally,
the sum of Five Hundred Dollars ($500.00) for the p
ment of which, well and truly to be made, we and e
of us bind ourselves and our successors, jointly and s
erally by these presents.

The conditions of the above obligation are such th

Whereas, the said Norwich Union Fire Insurance
ciety, Ltd., has applied by petition to the Court of C
mon Pleas of Guernsey County, Ohio, for the remo
of a certain cause therein pending, wherein J. M. Sc
is plaintiff and Norwich Union Fire Insurance Soci
Ltd., is defendant, to the District Court of the Unit
States for the Southern District of Ohio, Eastern Di
sion, for further proceedings on grounds in said petiti
set forth, and that all further proceedings in said act
in said Common Pleas Court be stayed.

Now, Therefore, if the said Norwich Union Fire In
Society, Ltd., shall enter into said District Court of th
United States for the Southern District of Ohio, Easte
Division, aforesaid, within thirty days from the date
filing said petition, a certified copy of the record in sa
suit, and shall well and truly pay all costs that may
awarded therein by said District Court of the Unit
States if said Court shall hold that said suit was wro
fully or improperly removed thereto, then this obli
tion shall be void, otherwise shall remain in full for
and effect.

Amended Petition.

In Witness Whereof the said parties hereto caused their respective names to be subscribed hereto, this the 7th day of January, 1927.

Norwich Union Fire Insurance Society, Ltd.
By R. M. Edmonds, Solicitor.
The Great American Indemnity Co. of New York.
By Frank J. Mockein, Attorney in Fact.
[Seal.]

Clerk's Certificate.

I, Thomas H. Snider, Clerk of the Court of Common Pleas within and for said County, and in whose custody the files, journals, and records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing—

Petition and Precipe, filed 12-29-26
Summons issued, 12-30-26
General Continuance of Oct. Term, 1926, Jour. 49, P. 255
Sumations returned and filed, 1-8-27
Petition, Bond for Removal, Notice and Acknowledgment of Service, filed 1-29-27
Journal Entry under date of January 31, 1927, as follows: "Application for order of removal to Federal Court is hereby sustained and granted"
Cost Bill, filed 2-11-27

are taken and copied from the original now on file in said Court, that the foregoing have been compared by me with said original documents and that the same are true and correct copies thereof.

In Testimony Whereof, I hereunto subscribe my name officially and affix the seal of said Court, at the Court-house, in Cambridge, Ohio, in said County, this 11th day of February, A. D. 1927.

Thomas H. Snider,
Clerk of Said Common Pleas Court.
By Stella Bliss Wheeler,
Deputy.

AMENDED PETITION—Filed October 18, 1927.

Defendant is a corporation, incorporated under the laws of some other state, or foreign country, and at the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio, through J. M. Brechen, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

On the 14th day of June, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, of the worth and value of $28,700.00, and at least one hundred and forty-four (144) wool bags, of the worth and value of $57.60, all of the value of $28,757.60, contained in the two story, slate roof, frame building, occupied as a wool storage building, situated on the west side of Cambridge Street, in the Village of Cumberland, Guernsey County, and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 14th day of June, 1926, in consideration of $73.02, annual premium, paid by plaintiff, defendant, by its policy of insurance No. 223, insured plaintiff against loss by fire to the amount of $5750.00, on said unwashed wool and on said wool sacks from the 14th day of June, 1926, at noon, to the 14th day of June, 1927, at noon.

Plaintiff says there was other concurrent insurance on the aforesaid property as permitted under the terms of said policy in the sum of $22,250.00.

On the said 6th day of September, 1926, while said policy of insurance was in full force, and while the aforesaid personal property was located in the aforesaid building hereinbefore described, and while said personal property consisted of the amount and was of the value hereinbefore stated, all of the aforesaid personal property was totally destroyed by fire, to plaintiff's damage in the sum of $28,757.60.

On or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property and furnished and delivered to defendant the pound

said unwashed wool and the number of said wool sacks contained by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as sett hereinafter stated, to wit: Said policy contained the following provision as a part thereof, to wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

After said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and at said time defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, agency. Dated June 24th, 1926.

"J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay plaintiff his loss covered by said policy, or any part thereof, for

such damages, so sustained by plaintiff, by reason of destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant, by reason of the premises herein, the sum of $5750.00, with interest thereon from the 6th day of September, 1926.

Wherefore, plaintiff prays judgment against defendant in the sum of $5750.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott,

By W. W. Stewart,
A. R. McCulloch,
Elwood Murphy and
James Joyce,
His Attorneys.

[Duly verified.]

ANSWER TO AMENDED PETITION—Filed November 12, 1927.

First Defense:

Now comes the defendant, Norwich Union Fire Insurance Society, Ltd., and for its first defense to plaintiff's amended petition admits that this defendant is a corporation duly incorporated under the laws of a foreign country, and at all times mentioned in the amended petition was duly authorized to issue insurance against loss by fire in Guernsey county, Ohio.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the amended petition and denies that said wool and wool bags and each of them referred to in the amended petition contained in said frame building referred to in said amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seven Thousand pounds of unwashed wool or was of the quantity of One Hundred and Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said

bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the amended petition on the 6th day of September, 1926, was very much less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

This defendant denies that by said policy referred to in the amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary, this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or not or by solvent or insolvent insurers covering such property.

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor

shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached."

This defendant denies that on September 6, 1926, the personal property referred to in the amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the amended petition, and denies that said personal property referred to in the amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the amended petition either on the 6th day of September, or at any other time in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the defendant the pounds of said unwashed wool and the number of said wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed all or any of the conditions of said policy on plaintiff's part, to be performed more than sixty days prior to the bringing of this action, or at any other time.

This defendant admits that said policy of insurance contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

This defendant admits that the plaintiff did not perform or comply with the said provisions contained in

said policy last hereinbefore quoted. This defendant denies that any other agreement than that contained in said policy of insurance was ever made between this defendant and the plaintiff. This defendant admits that after said policy was made and delivered to plaintiff a chattel mortgage on a part of the aforesaid personal property referred to and described in the amended petition and described in said policy of insurance was executed and delivered by the plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execution and delivery of said chattel mortgage, or at any time thereafter up until long after said fire, this defendant knew or had any knowledge whatever that said aforesaid personal property was encumbered by chattel mortgage, or that the plaintiff's ownership of said personal property was subject to said chattel mortgage.

This defendant denies that plaintiff's ownership to said personal property or any part thereof was sole and unconditional as to any or all of said personal property.

This defendant admits that there was attached to said policy of insurance and made a part thereof a loss payable clause in the following words and figures, to-wit:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy attached to and forming part of policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, Agency. Dated June 24th 1926."

This defendant denies that the plaintiff is or has ever been excused or relieved in any manner whatsoever or in any respect whatsoever by defendant concerning any matters and things, or any part thereof, including the performance of the conditions of said policy alleged in the amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained, among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Com-

panies, signing this agreement in ascertaining ... amount of loss and damage which occurred Sept... 1926, to property located at in rear lot — W/S of C... bridge St., Cumberland, Ohio, and in investigating ... cause thereof, shall not waive or invalidate any of ... conditions of the policies of Insurance, and shall ... waive or invalidate any rights whatever of any pa... to this agreement."

"Notice is hereby given and accepted, and it is here... mutually understood and agreed, that no representati... of any Insurance Company signing this agreement h... power or authority to waive any of the conditions ... their respective policies, unless such waiver be spec... cally made in writing.

"The sole object and intent of this agreement is ... provide for the determination of the amount of said l... and damage, and an investigation of the cause there... without regard to the liability of said Insurance Co... panies, and to preserve all the rights of all the parti... hereto."

This defendant denies each and every allegation an... averment in plaintiff's amended petition contain... which is not herein expressly or specifically admitte... or denied.

Second Defense:

This defendant for its second defense to plaintiff's amended petition makes each and all of the admissions averments and denials contained in its first defense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insuranc... contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or dam... age occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with materials of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and, the amount of loss or damage having been thus de... termined, the sum for which this company is liable pur... suant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

Answer to Amended Petition.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and

damage, and, failing to agree, shall submit their ... ences to the umpire; and the award in writing ... two shall determine the amount of such loss; the ... thereto shall pay the appraiser respectively select... them and shall bear equally the expenses of th... praisal and umpire.

"This company shall not be held to have waiv... provision or condition of this policy or any forf... thereof by any requirement, act, or proceeding ... part relating to the appraisal or to any exami... herein provided for, and the loss shall not becom... able until sixty days after the notice, ascertainme... timate, and satisfactory proof of the loss herein re... have been received by this company, including an ... by appraisers when appraisal has been required.

"No suit or action on this policy, for the re... of any claim, shall be sustainable in any court ... or equity until after full compliance by the insured ... all the foregoing requirements, nor unless comm... within twelve months next after the fire."

This defendant alleges that the plaintiff utterly ... to give immediate notice in writing of said alleged ... to this defendant company, as required by the ... quoted conditions contained in said policy.

This defendant alleges that the plaintiff utterly ... to make a complete inventory of said damaged an... damaged personal property, stating the quantity ... cost of each article and the amount claimed there... required by the above quoted conditions contain... said policy. This defendant alleges that the pl... utterly failed within sixty days after said fire, ... quired by the above quoted conditions contained in ... policy, and at all other times to render a statem... this defendant company, signed and sworn to by ... plaintiff, stating the knowledge and belief of the pl... tiff as to the time and origin of the fire, the interest o... insured and of all others in the property, the cash v... of each item thereof and the amount of loss thereo... all incumbrances thereon, all other insurance whe... valid or not covering any of said property, and ... other matters of information required by the ... quoted conditions contained in said policy; that ... plaintiff utterly failed within sixty days after sai... and at all other times to make and render to this ... fendant due proofs of said loss, as required by the ... quoted conditions contained in said policy.

This defendant alleges that subsequent to said fir... plaintiff and this defendant disagreed as to the a...

of loss caused by said fire to this property described in said policy; that the amount of loss caused by said fire to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Third Defense:

This defendant for its third defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described in said policy was not truly stated in said policy.

This defendant alleges that at the time of the said fire and for some time prior thereto the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership that at the time of said fire and for some time prior thereto a person, firm or corporation other than the plaintiff had title to or interest in said property or a part thereof described in said policy of insurance; that subsequent to the delivery and acceptance of said policy of insurance said personal property or a part thereof, which was the subject of insurance described in said policy became incumbered by a chattel mortgage executed by the plaintiff, which chattel mortgage remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title to or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof,

Answer to Amended Petition.

which was the subject of insurance described in said p
icy be or become incumbered by a chattel mortgage
in any manner altering any of the above quoted con
tions contained in said policy.

Fourth Defense:

This defendant for its fourth defense to plaint
amended petition makes each and all of the admissi
averments and denials contained in its first defens
part of this, its fourth defense as fully as if the s
were herein written.

This defendant alleges that said policy of insura
contained the following provisions:

"This entire policy shall be void if the insured
concealed or misrepresented, in writing or otherw
any material fact or circumstance concerning this
surance or the subject thereof; or if the interest of
insured in the property be not truly stated herein;
in case of any fraud or false swearing by the insu
touching any matter relating to this insurance or
subject thereof, whether before or after a loss."

This defendant alleges that subsequent to said
the plaintiff falsely and fraudulently stated in writ
to this defendant under oath that according to the pl
tiff's best judgment and belief said fire originated
lightning striking the building in which said alle
wool was stored; whereas in truth and fact, as the pl
tiff then well knew, said fire did not originate by li
ning striking said building.

This defendant alleges that subsequent to said fire
plaintiff further falsely and fraudulently stated in w
ing under oath to this defendant that no other pe
or persons had any interest in said wool or any
thereof contained in said barn at the time of said
except a chattel mortgage to The Cumberland Sa
Bank Company of Cumberland, Ohio; whereas, in t
and fact, as the plaintiff then well knew, another
son, firm or corporation other than the plaintiff
other than the said The Cumberland Savings Bank C
pany of Cumberland, Ohio, had title to or an int
in said wool or a part thereof located in said buil
at the time of said fire.

This defendant alleges that subsequent to said
the plaintiff further falsely and fraudulently stated
writing under oath to this defendant that at least
enty Thousand Pounds of unwashed wool belongi
the plaintiff was located in said building describ
said policy at the time of said fire and was dest
by said fire; that the actual cash value of said woo

scribed in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact, as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand Pounds, and whereas, in truth and fact, as the plaintiff then well knew, the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said fire plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact, as the plaintiff then well knew, many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew, an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to this defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore this defendant prays that it may be discharged from this action with a judgment for its costs herein expended.

Scott & Scott,
Cambridge, Ohio,
Mooney, Bibbee & Edmonds,
Columbus, Ohio,
Attorneys for Defendant.

[Duly verified.]

SECOND AMENDED PETITION—Filed Janua
1928.

Plaintiff, having first received leave of court
this, its second amended petition, says that the d
ant is a corporation, incorporated under the laws of
other state, or foreign country, and at all times h
after mentioned, was duly authorized to issue insu
against loss of fire in Guernsey County, Ohio, thro
M. Bracken, an agent, at Cumberland, Guernsey Co
Ohio, duly appointed by defendant for such purpo

That on the 14th day of June, 1926, and ever
and until after the 6th day of September, 1926, pla
was the sole and unconditional owner, except as he
after alleged, of the following personal property, to
wool and wool bags, consisting of at least seventy
sand (70,000) pounds of unwashed wool, of the worth
value of $28,700.00 and at least one hundred and f
four (144) wool bags, of the worth and value of $
all of the value of $28,757.60, contained in the two
slate roof, frame building, occupied as a wool sto
building, situated on the west side of Cambridge S
in the Village of Cumberland, Guernsey County,
State of Ohio, and occupied by assured during said
as a wool storage building.

That on the 14th day of June, 1926, in consider
of $73.02 annual premium, paid by plaintiff, the de
ant, by its policy of insurance No. 223, insured p
tiff against loss by fire to the amount of $5750.00, on
unwashed wool and on said wool sacks from the 14th
of June, 1926, at noon, to the 14th day of June,
at noon.

Plaintiff says there was other concurrent insuranc
the aforesaid property, as permitted under the term
said policy in the sum of $22,250.00.

That on said 6th day of September, 1926, while said
licy of insurance was in full force, and while the afor
personal property was located in the aforesaid bui
hereinbefore described, and while said personal pro
consisted of the amount and was of the value he
before stated, all of the aforesaid personal property
totally destroyed by fire, to plaintiff's damage in
sum of $28,757.60.

That on or about the 6th day of September, 1926
immediately after said loss by fire, plaintiff notifie
defendant thereof and on said day and within sixty
after said fire, filed his proof of loss in writing,
and sworn to by plaintiff, and rendered the same
fendant, and at the request of defendant plaintiff
nished and delivered to defendant true copies of

insurance policies held by him on said personal property and furnished and delivered to defendant the number of said unwashed wool and the number of said wool sheep consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as hereinafter stated to wit:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be * * * personal property and be or become incumbered by a chattel mortgage."

When said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, on or about the 19th day of June, 1926, and defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "Loss Payable Clause" in the following words and figures, to-wit:

"Loss Payable Clause"

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, agency. Dated June 24, 1926.

J. M. Bracken, Agent.

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "Loss Payable Clause" on said policy hereto is as follows:

"In the event of disagreement as to the amount o
the same shall, as above provided, be ascertained b
competent and disinterested appraisers, the insure
this company each selecting one, and the two so
shall first select a competent and disinterested um
the appraisers together shall then estimate and app
the loss, stating separately sound value and damage,
failing to agree, shall submit their differences to
umpire; and the award in writing of any two shall d
raise the amount of such loss; the parties thereto
pay the appraiser respectively selected by them and
bear equally the expenses of the appraisal and umpi
" * * * and the loss shall not become payable
sixty days after the notice, ascertainment, estimate,
satisfactory proof of the loss herein required have
received by this company, including an award by
praisers when appraisal has been required."

Plaintiff further says that he has not asked for an
praisement for the following reasons:

That on or about the 15th day of September, 1926,
defendant, through its adjuster, to wit, A. C. Har
being the agent in charge of said loss under said po
said to the plaintiff, and notified the plaintiff, that
property destroyed by fire was a total loss, and
there was no property to appraise.

Plaintiff further alleges that the defendant never
any demand or any requirement for an appraisement
said loss of the property.

Plaintiff further alleges that the defendant, at no
named an appraiser for the defendant, or requested
appraisement to be made or an appraiser to be appoi
by the plaintiff, by reason of the provisions of said po
or otherwise.

Plaintiff further says that the defendant, through
said adjuster, wholly waived any appraisement of
total loss and waived the selection of an appraiser
the following demands, requirements and contract
the plaintiff, to wit:

That after the said plaintiff had exhibited to the
juster the destroyed premises, and given a full st
ment of the amount of the contents of the said wool h
and the price and quantity of wool that had been
and there destroyed by said fire, the said adjuster
the following proposition to plaintiff, to wit:

"All the additional proof I will require of you,
you to procure for the defendant company an item
statement of the amount of pounds of wool and the
of the sales of the same and by whom said to you

that will be sufficient. That if said list of farmers and wool growers and said sales to you amounted to seventy thousand pounds of wool, or more, (being the same amount that the plaintiff was claiming or claimed to a total loss), that he, the said adjuster, would at once check up such list of farmers and wool growers for said defendant company on his return to plaintiff's residence at Cumberland, Ohio, where said fire took place, and if said list would show a loss, as claimed by plaintiff, that it would be satisfactory to the defendant company for proof of loss, and there would be no further trouble about the adjustment of the loss to plaintiff, under said policy, and that the defendant company would at once pay the same.

Said adjuster further stated to plaintiff, then and there, that while plaintiff was procuring said data, so requested, that the plaintiff would get the usual letter from the defendant company, and that he, said adjuster, would come back after plaintiff had received such usual letter and check up such list, and further represented to plaintiff that this would be all plaintiff had to do.

Plaintiff thereupon explained to said adjuster, so representing the defendant company, that many of such farmers and wool growers lived far from Cumberland, Ohio, and in several counties, and the books and records of such sales, including the addresses of said farmers, were in the office located in the building which was then and there burned. Plaintiff further explained to the said adjuster that it would require the help of his son who had knowledge of these farmers and wool growers and who knew of their addresses and perhaps with the help of others, he could make out such a list by calling directly upon such farmers and wool growers. Thereupon the said adjuster insisted upon plaintiff going to said expense and to spending his time and the time of his son, in making this particular kind of proof for the benefit of said defendant company.

Plaintiff further says that by reason of the great number of such vendors and distance of said vendors, from Cumberland, Ohio, and owing to the conditions of the roads, it required upwards of forty days of time and expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

Plaintiff further says that at the end of said period, he had complied with the request and demand of the defendant company by making said calls and procuring the individual signatures to said schedules of all of said quantities and sales, which totalled in excess of the

amount of wool established by the proof and loss theretofore made to said adjuster, and which was in full compliance with the request and demand of said defendant company.

Plaintiff further says that he expended in time and money in so procuring the aforesaid data, as requested by the defendant, more than $200.00, the exact amount plaintiff is unable to definitely state; that plaintiff fully completed the work of so securing the names of said persons and the signatures, together with the amount of wool so sold and delivered to him and so burned, as speedily as was possible to accomplish the same, and at as reasonable an expense as the same could be performed.

Plaintiff further says that he has had in his possession all the aforesaid information at Cumberland, Ohio, in accordance with his agreement, and has ever been ready to submit the same to the adjuster for his verification and to check up the same, as was then and there and theretofore agreed to be done by him.

Plaintiff is still ready and willing to do so, notwithstanding the defendant company has failed and refused to call for said information or accept the same as it had then and there agreed to do.

Defendant, after plaintiff complied with the defendant's aforesaid request, wholly failed to call for the list of the names of the farmers and wool growers so individually signed by the farmers and wool growers and wholly failed to call for said schedule of sales, as was agreed to, and has ever since refused payment of said loss, both before and after suit was filed.

Defendant is therefore estopped to claim any other or different proofs of appraisement other than the aforesaid contract or requirement, fully complied with on the part of said plaintiff.

Defendant well knew that plaintiff was collecting said data and expending said money, and permitted plaintiff to be lulled along believing and knowing that plaintiff was then and there relying upon said request and acting thereon in good faith, when it requested additional proof of loss, and the amount thereof in this form.

Plaintiff further says, on the faith of said premises, he performed all of said services and expended said money as aforesaid, and not otherwise.

By reason whereof, the defendant has wholly waived the conditions of said policy requiring any other additional proof of loss from plaintiff and waived any other requirement of appraisement or any other condition of said policy.

Answer to Second Amended Petition.

Plaintiff further says that he is and ever has been excused and relieved from furnishing further proof in all respects touching or relative to said matters and things, required in said policy in respects to said appraisement or any further proof of loss, including any other or further conditions of said policy in establishing or agreeing to establish the quantity of wool so destroyed by fire.

That said defendant is therefore wholly estopped from requiring or demanding of said plaintiff any further appraisement or proof of loss of said wool.

Defendant has failed and refused to pay plaintiff his loss, as covered by said policy, or any part thereof, for such damages, so sustained by plaintiff, by reason of the destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant by reason of the premises herein, the sum of $5750.00 with interest thereon from the 6th day of September, 1926.

Wherefore plaintiff prays judgment against defendant in the sum of $5750.00 with interest thereon from the 6th day of September, 1926, and for costs of suit.

F. S. Monnett,
Elwood Murphy,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

[Duly verified.]

ANSWER TO SECOND AMENDED PETITION—Filed February 25, 1928.

First Defense:

Now comes the defendant, Norwich Union Fire Insurance Society, Ltd., and for its first defense to plaintiff's second amended petition admits that this defendant is a corporation duly incorporated under the laws of a foreign country, and at all times mentioned in the second amended petition was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio.

Answer to Second Amended Petition.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the second amended petition and denies that said wool and wool bags and each of them referred to in the second amended petition contained in said frame building referred to in said second amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seventy Thousand pounds of unwashed wool or was of the quantity of One Hundred and Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said wool bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the second amended petition on the 6th day of September, 1926, was very much less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

This defendant denies that by said policy of insurance referred to in the second amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the second amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or not or by solvent or insolvent insurers covering such property.

"This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the follow-

stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

This defendant denies that on September 6, 1926, said personal property referred to in the 2d amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the second amended petition, and denies that said personal property referred to in the second amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the second amended petition either on the 6th day of September, or at any other time, in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the defendant the pounds of said unwashed wool and the number of wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed

Answer to Second Amended Petition.

all or any of the conditions of said policy on plain[illegible] part to be performed more than sixty days prior t[illegible] [illegible] of this action, or at any other time.

This defendant admits that said policy of insur[illegible] contained the following provisions:

"This entire policy, unless otherwise provide[illegible] agreement endorsed hereon or added hereto, sha[illegible] void, if the interest of the insured be other than un[illegible] ditional and sole ownership, or if the subject of in[illegible] ance be personal property and be or become incumb[illegible] by a chattel mortgage."

This defendant admits that the plaintiff did not [illegible] form or comply with the said provisions contained [illegible] said policy last hereinbefore quoted. This defend[illegible] denies that any other agreement than that contained [illegible] said policy of insurance was ever made between t[illegible] defendant and the plaintiff. This defendant admits t[illegible] before said policy was made and delivered to plain[illegible] a chattel mortgage on a part of the aforesaid perso[illegible] property referred to and described in the sec[illegible] amended petition and described in said policy of in[illegible] ance was executed and delivered by the plaintiff to T[illegible] Cumberland Savings Bank Company of Cumberla[illegible] Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execut[illegible] and delivery of said chattel mortgage, or at any ti[illegible] thereafter up until long after said fire, this defend[illegible] knew or had any knowledge whatever that said afo[illegible] said personal property was encumbered by chattel mo[illegible] gage, or that the plaintiff's ownership of said perso[illegible] property was subject to said chattel mortgage.

This defendant denies that plaintiff's ownership [illegible] said personal property or any part thereof was sole a[illegible] unconditional as to any or all of said personal prope[illegible]

This defendant admits that there was attached to [illegible] policy of insurance and made a part thereof a loss p[illegible] able clause in the following words and figures, to-wi[illegible]

"Any loss under this policy that may be proved [illegible] the assured shall be payable to the assured and The C[illegible] berland Savings Bank Co., Cumberland, Ohio, sub[illegible] [illegible] to all the terms and conditions of the p[illegible] attached to and forming part of policy No. 223 of [illegible] Newark Union Fire Insurance Society, New York [illegible] [illegible] Cumberland, Ohio, Agency." Dated June [illegible] [illegible]

This defendant denies that the plaintiff is or has [illegible] been [illegible] or relieved in any manner whatsoev[illegible] [illegible] whatsoever by defendant concerning [illegible]

matters and things, or any part thereof, including the performance of the conditions of said policy alleged in said second amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant admits that the plaintiff has not asked for an appraisement of the amount of said loss.

This defendant denies that this defendant ever through any adjuster, or through one A. C. Harrod, or through any agent in charge of said loss under said policy, or otherwise, at any time said to the plaintiff, or notified the plaintiff that said property claimed to have been destroyed by fire was a total loss, or that there was no property to appraise.

This defendant denies that this defendant never made any requirement for an appraisement of said loss to said property.

This defendant denies that this defendant through said alleged adjuster, or otherwise, wholly waived, or waived at all or is estopped to insist upon any appraisement of said loss, or waived the selection of an appraiser, either by said alleged demands, alleged requirements, or alleged contracts referred to in the second amended petition, or otherwise.

This defendant denies that the plaintiff ever at any time exhibited to this defendant, or its adjuster, said destroyed or damaged premises, or ever at any time gave a full statement of the amount of the contents of said barn, or of the prices, or of the quantity of wool that had been, or were damaged or destroyed by said fire, and denies that said alleged adjuster, or any adjuster of this defendant, made said alleged proposition to the plaintiff set forth in said second amended petition, or stated to the plaintiff that all any adjuster would require of plaintiff was to procure for the defendant company an itemized statement of the amount of pounds of wool and of the dates of sale of same, and by whom sold by the plaintiff, or ever at any time stated that such itemized statement would be sufficient.

This defendant denies that this defendant through any adjuster, or otherwise, ever at any time stated to the plaintiff that if said list of farmers and wool growers from said sales to plaintiff amounted to Seventy Thousand pounds of wool, or more, that any adjuster of this defendant would at once check up such list of farmers and wool growers for said defendant company on his visit to plaintiff's residence at Cumberland, Ohio, or would return at all to plaintiff's residence at

Cumberland, Ohio, or that if said list would show a loss as claimed by plaintiff that it would be satisfactory to the defendant company for proof of loss, or that there would be no further trouble about the adjustment of the loss to plaintiff under said policy, or that the defendant company would at once pay the same, and denies that this defendant ever, through any adjuster, or otherwise, made any of said statements in substance or form as alleged in the second amended petition.

This defendant denies that said alleged adjuster, or this defendant, stated to the plaintiff then and there, or at any other time, that while plaintiff was procuring said data so requested that the plaintiff would get the usual letter from the defendant company, or any letter from the defendant company; or that said alleged adjuster would come back after the plaintiff had received such usual letter, or any letter, and check up such list, or ever at any time represented to the plaintiff that this would be all that the plaintiff had to do.

This defendant denies that the plaintiff thereupon, or at any time, explained to said alleged adjuster that many of said farmers and wool growers lived far from Cumberland, Ohio, or in several counties.

This defendant denies that the plaintiff explained to any adjuster of this defendant that it would require the help of plaintiff's son, or perhaps the help of others, to make out said alleged list by calling directly upon said farmers or wool growers, and denies that any adjuster of this defendant insisted upon plaintiff going to any expense or spending plaintiff's time or that of his son in making said particular alleged form of proof either for the benefit of the defendant, or otherwise.

The defendant denies that it required upwards of forty days of time or expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

This defendant denies that at the end of said period, or at any time, the plaintiff complied with any request or demand of the defendant, or procured or made said calls and procured the individual signatures to said alleged schedule of all of said alleged amounts and sales, with the knowledge of the defendant, or otherwise, and denies that said alleged schedule totalled in excess of the amount of wool set forth in any proof of loss theretofore made to any adjuster of this defendant, and denies that any alleged schedule was in full compliance with any request or demand of this defendant company.

This defendant denies that plaintiff expended the sum

of $200.00 in procuring said alleged data. Defendant denies that the plaintiff completed the work if any of securing the names of said persons and said signatures, together with the amount of wool so sold and delivered to the plaintiff and claimed to have been burned as speedily as possible to accomplish same.

This defendant denies that the plaintiff has had in his possession said alleged information at Cumberland, Ohio, in accordance with any agreement, or otherwise, or that the plaintiff has ever been ready, or at any time ready, to submit the same to any adjuster of this defendant, and denies that this defendant has ever at any time agreed to call for, or accept, said alleged information.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated and Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept. 6, 1926, to property located at in rear lot — W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement."

"Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

"The Sole object and intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto."

This defendant denies that this defendant ever knew that the plaintiff was collecting any data or expending any money, and denies that this defendant permitted the plaintiff to be tolled along, or that the defendant believed or knew that the plaintiff was relying upon any request, relying thereon in good faith, and denies that on the [illegible] of any promises plaintiff performed any services or expended any money, or that the defendant has

waived the conditions of said policy requiring any ... additional proofs of loss from the plaintiff, or that ... defendant has waived any other requirement of appra... ment or other conditions of said policy, or that the ... fendant is estopped to assert any condition of said po...

This defendant denies each and every allegation ... averment in plaintiff's second amended petition ... tained which is not herein expressly or specifically ... mitted or denied.

Second Defense:

This defendant for its second defense to plaintiff's second amended petition makes each and all of the ad... missions, averments and denials contained in its first de... fense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or dam... age occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the in... sured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus deter... mined, the sum for which this company is liable pur... suant to this policy, shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this com... pany, signed and sworn to by said insured, stating to the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not,

ering any of said property; and a copy of all the descriptions and schedules in all policies; and changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

Answer to Second Amended Petition.

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This defendant alleges that the plaintiff utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy.

This defendant alleges that the plaintiff utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy. This defendant alleges that the plaintiff utterly failed within sixty days after said fire, as required by the above quoted conditions contained in said policy, and at all other times, to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the above quoted conditions contained in said policy; that the plaintiff utterly failed within sixty days after said fire and at all other times to make and render to this defendant due proofs of said loss, as required by the above quoted conditions contained in said policy.

This defendant alleges that subsequent to said fire the plaintiff and this defendant disagreed as to the amount of loss caused by said fire to this property described in said policy, that the amount of loss caused by said fire to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Third Defense:

This defendant for its third defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the

terest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described in said policy was not truly stated in said policy.

This defendant alleges that at the time of said fire and for some time prior thereto including the date of the issuance of said policy, the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership that at the time of said fire and for some time prior thereto and at the date of issuance of said policy a person, firm or corporation other than the plaintiff had title to or an interest in said property or a part thereof described in said policy of insurance; that at and prior to the delivery and acceptance of said policy of insurance said personal property or a part thereof, which was the subject of insurance described in said policy was incumbered by a chattel mortgage, executed by the plaintiff, which chattel mortgage remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title to or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof, which was the subject of insurance described in said policy be or become incumbered by a chattel mortgage, or in any manner altering any of the above quoted conditions contained in said policy.

Fourth Defense:

This defenant for its fourth defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its fourth defense, as fully as if the same were hereth written.

This defendant alleges that said policy of insurance contained the following provisions:

Answer to Second Amended Petition.

"This entire policy shall be void if the insured ... concealed or misrepresented, in writing or otherwise, ... material fact or circumstances concerning this in... ance, or the subject thereof; or if the interest of the ... sured in the property be not truly stated herein; or ... case of any fraud or false swearing by the insured tou... ing any matter relating to this insurance or the subj... thereof, whether before or after a loss."

This defendant alleges that subsequent to said fire ... plaintiff falsely and fraudulently stated in writing ... this defendant under oath that according to the pla... tiff's best judgment and belief said fire originated ... lightning striking the building in which said alleg... wool was stored; whereas in truth and fact, as the pla... tiff then well knew said fire did not originate by ligh... ning striking said building.

This defendant alleges that subsequent to said fire ... plaintiff further falsely and fraudulently stated in wri... ing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Co... pany of Cumberland, Ohio; whereas, in truth and fact as the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio had title to or an interest in said wool or a part thereof located in said building at the time of said fire.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least Seventy Thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire; that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand pounds, and whereas, in truth and fact as the plaintiff then well knew the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said ...

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plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact as the plaintiff then well knew many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to the defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore, this defendant prays that it may be dismissed from this action with a judgment for its costs herein expended.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

REPLY—Filed March 10, 1928.

Now comes the plaintiff, J. M. Scott, and for reply to the answer of the defendant to plaintiff's second amended petition admits that he signed a certain paper writing subsequent to said alleged fire, to wit, on or about the day of September, 1926, but denies that the same was anywise a non-waiver agreement; that there was no consideration whatever for said agreement, and that the non-waiver proposition, for whatever purposes it

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was signed, was immediately waived and avoided by the subsequent condition of the Company as set forth in the second amended petition by requiring plaintiff to procure the written statements of the vendors of wool that furnished the proof or intended to prove the amount of wool in said building consumed, and as the same is more fully set forth in plaintiff's second amended petition herein filed, which is hereby adopted as a complete waiver to this alleged condition subsequent claimed in said non-waiver agreement.

For further reply, plaintiff denies that he utterly failed to give immediate notice in writing of said alleged loss to this defendant Company, as required by the above quoted conditions contained in said policy, and further alleges that plaintiff did give immediate notice of said alleged loss to the defendant Company, which notice was then and there accepted by the defendant Company, and acted upon by the defendant Company, and it appeared and investigated the entire subject matter of the loss and made an estimate thereof in response to said notice of said destroyed property.

Plaintiff further denies that he utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy and set forth in defendant's answer.

Plaintiff denies that he utterly failed within sixty days after said fire, as required by the quoted conditions contained in said policy and set forth in said answer, and at all other times, to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured, and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the quoted conditions contained in said policy.

Plaintiff further denies that he utterly failed within sixty days after said fire and at all other times to make and render to said defendant due proofs of said loss, as required by the quoted conditions contained in said policy, but alleges that he complied with all of the requirements of said policy and that the said defendant company is estopped and barred from requiring

other or different proof or proofs either as to the value or quantity of property so destroyed by fire, for the reason that said defendant Company required plaintiff to procure a list and quantity and the value thereof from all of said vendors of wool, with an agreement, that the said list would be fully satisfactory to the defendant and would be sufficient and would comply with the said terms of the policy, and the plaintiff in compliance with the said request prepared the statement made by the vendors for said defendant company, and has at all times held the same subject to their call and investigation as per agreement with said defendant company, as more fully set forth in plaintiff's second amended petition.

Plaintiff further denies that subsequent to said fire the plaintiff and the defendant ever disagreed as to the amount of loss caused by said fire to the property described in said policy or subsequently furnished to said defendant company, as aforesaid; admits that the amount of loss caused by said fire has never, at any time, been ascertained by appraisers, but that the said appraisement was waived and that further appraisement to ascertain the value was waived by requiring plaintiff to furnish an itemized list of the amount and value of wool contained in said barn by having the same verified and certified by the original vendors of said wool, as fully set forth in plaintiff's second amended petition therein.

Plaintiff admits that the quoted clause of the policy set forth in the defendant's third defense is substantially correct, but denies that the interest of the plaintiff in said property, or any part described in said policy, was not truly stated by plaintiff to defendant.

Plaintiff further denies that the time of delivery or acceptance of said policy of insurance or any or all times thereafter, up and until the time of said fire, the interest, if any, of the plaintiff in said property, or a part thereof, described in said policy, was other than unconditional and sole ownership; and denies that the same is not truly stated in said policy.

Plaintiff further alleges that the title or interest in any part described in said policy was encumbered by chattel mortgage and was fully known by the defendant company, and was ratified and accepted by said defendant company and it collected premiums thereon and thereafter with full knowledge thereof, and that the same was fully known to the said defendant company at all times and was fully ratified by said defendant company,

as more fully set forth in said plaintiff's second amended petition.

Plaintiff for reply to the fourth defense admits that the quoted portion or extract alleged to be taken from the policy of insurance is substantially correct, but denies that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to the defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored. Plaintiff denies that he then and there well knew that said fire did not originate by lightning striking the building.

Plaintiff for reply to the fourth defense denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to the defendant that no other person or persons had any interest in said wool, or any part thereof, contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; plaintiff further denies that the plaintiff then well knew another person, firm, or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to, or an interest in said wool or a part thereof located in said building at the time of said fire.

Plaintiff further reply to the fourth defense, denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least seventy thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire. Plaintiff further denies that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00. And further denies that whereas, in truth and fact, as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed twelve thousand pounds, and further denies, and whereas, in truth and fact, as the plaintiff well knew, the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of $4,000.00.

Plaintiff further denies that subsequent to said fire he further falsely and fraudulently stated to this defendant in writing underneath that no articles were mentioned

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in said sworn statement but such as were in said building damaged or destroyed and belonging and in the possession of the plaintiff at the time of said fire, and further denies that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made.

Plaintiff further denies that he then well knew, many articles were mentioned, in said sworn statement which were not in said building damaged and destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire. Plaintiff further denies that he well knew an attempt to deceive this defendant company as to the extent of said loss had been made and was then and thereby being made by the plaintiff, as alleged in said fourth defense of defendant's answer.

Plaintiff further denies that any false and fraudulent statements made by him to the defendant, as set forth in the fourth defense or in any of the other defenses with any purpose or intent on the part of the plaintiff to deceive or defraud the defendant, and further alleges that the defendant was neither deceived or defrauded in this behalf or in any other respect, as set forth in defendant's answer.

Wherefore plaintiff prays for judgment as in his second amended petition set forth.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

ORDER—Filed June 15, 1925.

This day these causes came on to be heard whereupon it is ordered by the court that said causes be, and the same hereby are, consolidated for the purposes of trial, to which order of consolidation the defendant excepted. And thereupon to try the issues joined between the

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parties, a jury being called came, to-wit: James Ba[illegible] tine, J. A. Black, Pearl Durnelle, J. D. Dunnigan, B[illegible] Edwards, Samuel Eichenbaum, Clarence Ewing, E[illegible] Enderlin, Homer Feldner, George Hartman, Jerry H[illegible] mon, and Joseph Henderson, who were duly empa[illegible] and sworn well and truly to try the issues joined betw[illegible] the parties in said causes, and at the hour of adjo[illegible] ment, the testimony not being concluded, the court a[illegible] spited the jury until nine-thirty o'clock tomorrow mor[illegible] ing, to which time these causes are continued.

ENTRY—Filed June 14, 1928.

This day again came the parties, by their respective attorneys, also the jury heretofore empaneled and sworn herein, and having heard the testimony on behalf of plaintiff and defendant, thereupon defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled, to which ruling of the court the defendant excepted. Whereupon came the plaintiff and moved the court to instruct the jury to return a verdict in favor of the plaintiff, which motion was by the court sustained and the jury was instructed to return a verdict for the plaintiff for the sum of $5750.00 with interest from September 6, 192[illegible] to which ruling of the court the defendant excepted.

Whereupon came the jury and upon their oaths find the issues joined in favor of the plaintiff and assess his damages at the sum of $5750.00 with interest from Sept. 6, 1926.

VERDICT—Filed June 14, 1928.

We, the Jury, herein do find the issues joined in favor of the plaintiff and assess his damages at fifty-seven hundred and fifty dollars with interest from September 6, 1926.

(Signed) R. P. Enderlin,
Foreman.

MOTION FOR NEW TRIAL—Filed June 16, 1928.

Now comes the defendant, The Norwich Union Fire Ins. Company, and moves the court to vacate and set aside the verdict of the jury heretofore rendered herein and to grant a new trial herein upon the following grounds, to-wit:

1. The verdict of the jury is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.
2. The verdict of the jury is contrary to the evidence and the weight thereof.
3. The verdict of the jury is contrary to law and the evidence.
4. The verdict of the jury is contrary to law.
5. The findings and decision of the court, and each thereof, is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.
6. The findings and decision of the court, and each thereof, is contrary to the law and evidence.
7. The findings and decision of the court, and each thereof, is contrary to law.
8. The court erred in excluding certain evidence offered by the defendant, to which action by the court the defendant at the time excepted.
9. The court erred in admitting certain evidence offered by the plaintiff over the objection of the defendant to which the defendant at the time excepted.

Motion for New Trial.

10. The court erred in not striking from the rec[illegible] or excluding from the consideration of the jury, on m[illegible]tion of the defendant, certain evidence offered on [illegible] half of the plaintiff, to which ruling of the court the [illegible]fendant at the time excepted.

11. The court erred in overruling the motion made [illegible] the defendant at the conclusion of the statement of t[illegible] case by plaintiff's counsel to render judgment in t[illegible] case in favor of the defendant upon the statement of t[illegible] case by plaintiff's counsel upon the ground that upo[illegible] the statement of the case made by plaintiff's counsel th[illegible] plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

12. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

13. The court erred in its general charge to the jury.

14. The court erred in overruling the motion made by the defendant at the conclusion of the plaintiff's case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

15. The court erred in overruling the motion made by the defendant at the conclusion of all of the evidence in the case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

16. There was error and abuse of discretion in the order of the court in consolidating this action with four other actions pending in this court, to which the defendant at the time objected and excepted.

17. The court erred in directing the jury to retu[illegible] a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

18. The court erred in not submitting to the jury the issue as to the amount of the loss.

19. The verdict of the jury is excessive.

20. There are other errors of law prejudicial to defendant appearing on the face of the record which occurred at and during the progress of the trial and to [illegible] of which errors this defendant at the time duly excepted.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

ENTRY—Filed August 7, 1928.

This cause coming on for hearing, on the motion of the defendant to set aside the verdict, and for a new trial herein, the court, on consideration thereof, overrules the same.

It is therefore considered by the court that the said plaintiff, J. M. Scott, recover from the said defendant, Norwich Union Fire Insurance Society, Ltd., the said sum of $6412.50 as heretofore, by the verdict of the jury, found due him, with interest computed to the date of this entry, together with his costs herein expended, taxed at $....., including a docket fee of $20.00 payable to the attorneys for the plaintiff, under provisions of Section R. S. U. S. 572, Title 28.

To all of which ruling, order and judgment the defendant excepts.

Benson W. Hough, Judge.

ORDER EXTENDING TIME FOR FILING DEFENDANT'S BILL OF EXCEPTIONS—Filed September 13, 1928.

Upon application of the defendants and each of them, and for good cause shown, the time for filing and having allowed and signed the bill of exceptions in the above entitled causes, and each of them, is hereby extended to October 1, 1928.

Hough, Judge.

BILL OF EXCEPTIONS—NARRATIVE FORM—F
September 22, 1928.
Wednesday Morning Session, June 13, 192
Present:
Messrs. James Joyce, F. S. Monnett and Elw
Murphy, on behalf of the plaintiff.
Messrs. R. M. Edmonds and G. E. Bibbee, on beh
of each defendant.

Be it remembered, That on the trial of the above
titled causes in the District Court of the United St
for the Southern District of Ohio, Eastern Division,
the June, 1928 term thereof, before the Honorable Be
son W. Hough, a Judge of said Court, and a jury du
empaneled and sworn, the following proceedings we
had:

The Court, before the commencement of the trial
the above entitled causes stated and ordered in op
court that the above entitled causes should be and we
consolidated for the purposes of trial and tried in o
trial.

Mr. Edmonds: If the Court please, at this point the de
fendant insurance companies, and each of them, The Su
Insurance Company in case 2563, The Home Insurance
Company in case 2560, the Norwich Union Fire Insu
ance Society in case 2564, The Westchester Fire Insu
ance Company in case No. 2562 and the New Yor
Underwriters Insurance Company in case 2561, and eac
of them object to the consolidation of these cases for
trial in a single trial, upon the ground that the issue
and questions involved in the several cases are no
identical but different.

Second, that in three of the cases, namely, the cas
against The Home Insurance Company, the case against
The Norwich Union Fire Insurance Company, the ca
against the Sun Insurance Office, the question arises
to the effect of a loss payable clause attached to the
policies which question is not involved in any way
the other cases. The defendants object to consolidati
upon that ground.

The next ground of objection is that different agen
issued the several policies and another agent the
maining two and that the questions involved are di
ferent in that respect.

The next ground of objection is that the question
parties arises in these cases which question will be co
mon to some but not involved in others of the group.

For these reasons, each of the defendant insura
companies object to the consolidation of the cases.

The Court: Objection by counsel for the defen

representing the five defendants may be entered on the record and the objections are overruled and exceptions of the several defendants noted, it appearing that these cases filed in the state Court were removed by the defendant insurance companies to this Court to apply to the jurisdiction of this Court for trial, and it further appearing that the plaintiff is identical in all five cases and that the subject matter of the suit depends upon a loss by fire which is common to all the cases.

If corporations insist upon invoking the jurisdiction of this Court it will be necessary for them to submit to the orders of this Court in questions of the procedure in trial. The cases will be consolidated and are consolidated and will be tried by one jury. Call the jury, Mr. Clerk.

To all of which rulings each defendant in the several above entitled cases at the time duly excepted for the several reasons stated in the objection to consolidation.

Thereupon statements of the case were made by counsel for the respective parties.

Wednesday Morning Session, June 13, 1928.

The Court: The plaintiff may state its case against the defendants to the jury.

Mr. Murphy: May it please the Court and Gentlemen of the Jury, there are five cases to be submitted to you in which J. M. Scott of Cumberland, Guernsey County, Ohio, is the plaintiff and the names of the defendant insurance companies have already been stated to you by the clerk when he swore you.

We expect the evidence to develop this state of affairs: J. M. Scott is a wool buyer, has been for years, is now, and lives in Cumberland, Ohio, and transacts his business there.

The Court: Just a minute; any separation of witnesses desired?

Mr. Murphy: Not on our part, Your Honor.

Mr. Edmonds: Yes, Your Honor.

The Court: All witnesses to be used in the trial of the cases on either side may retire from the Court Room until called as witnesses.

Mr. Edmonds: If your Honor please, the representatives of the insurance companies we may want to have present at times and may want to use as witnesses, if that is permissible.

The Court: Each of the defendant companies is entitled to one representative to represent it in Court. That is all right.

Mr. Murphy: In this town of Cumberland, on what is

known as Cumberland Street the plaintiff owned a [illegible] frame building, used for storing wool; adjacent th[illegible] on the same lot, he lives in his six room house, o[illegible] by himself, occupied by himself, his wife and his da[illegible] ter.

On the 6th day of September, 1926, the plaintiff stored in this wool house about 82,000 pounds of washed wool, his own individual property.

The Court: 80,000 pounds, you say?

Mr. Murphy: 82,000 pounds and a little over. On the morning of the 6th of September, while this wool was there, the wool house took fire and was totally destroyed, the building and all the contents, including this 82,000 pounds of wool. We believe the evidence will show that this wool was worth, at the time of its destruction in Cumberland, Ohio, from 40 to 42 cents per pound, in other words, approximately $33,000.00. This fire occurred about 3:30 or 4:00 o'clock in the morning at a time when there was a terrific electrical storm passing over there, thunder, lightning and rain. This building was owned by the plaintiff, worth about $3,000.00 and insured for $700.00 only. The property in which he lives, which is about 80 or 100 feet away, his dwelling, is worth $5,000.00 and insured for $3,000.00. In it sleeping that night were his wife, an invalid, himself and his daughter. He was wakened up by the crash of fire. At the time of this fire each of these defendants had insurance policies on this wool ranging from $3,500.00 to $8,000.00 each. Some had existed for some time. The latest one was the 14th day of August preceding the fire.

Prior to the time of the fire the plaintiff had placed upon the wool 45000 pounds of it, a chattel mortgage in favor of The Cumberland Savings Bank of Cumberland, Ohio,—40,500 pounds of wool, that is it. At the time of the placing of the mortgage upon this wool, three of the defendants, the Home Insurance Company, The Sun Insurance Office and The Norwich Fire Insurance Company, were notified, as the agent of the company was also connected with the bank to which he gave the chattel mortgage and immediately attached to said policies the loss payable clause. On the 14th day of August he went to the agent of The New York Underwriters Insurance Company, as well as the agent of The Westchester Fire Insurance Company of New York and there obtained from that agent, whose name is Stottsberry, a renewal of his insurance policy of $3,500.00 with The New York Underwriters Insurance Company, who, as I say, is also the agent for The Westchester Fire Insurance [illegible]

pany and got that renewal at that time and at that time told Mr. Stottsberry, who is the agent who issued the policies and was at the time of which I speak, that there was a chattel mortgage on this property of 40,500 pounds of it, with The Cumberland Savings Bank of Cumberland, Ohio. No cancellation was made of the policies, no demurrer was entered by these two insurance companies of which I speak. It ran along until the fire. After the fire occurred, Mr. Scott immediately notified each of the defendant companies' agents that came there to represent them a week or so afterwards and Mr. Harrod, as an adjuster of the companies. The evidence will show that the adjuster and Mr. Scott met in The Cumberland Savings Bank rooms, and there a conversation was begun about the loss. Mr. Harrod said to Mr. Scott, "Now, you know, Mr. Scott, that there wasn't 78,000 pounds of wool in that building and it didn't burn and couldn't burn." Mr. Scott said to him "Mr. Harrod, it did burn and it was there." Mr. Harrod further said "Your building will not hold that amount of wool." Mr. Scott said "You don't know what you are talking about, for I loaded out of that building at one time 178,000 pounds of wool or thereabouts." Then Mr. Harrod said to Mr. Scott "Let us go to the building that was burned." So they went down there through two alleys, arrived at the building and it was viewed by both of them. Mr. Harrod said to Mr. Scott "Will you help me measure this building?" Then they took measurements, talked some more about the fire and then went up to the porch of this dwelling, on the same lot owned and occupied at that time by Mr. Scott. Mr. Harrod said to Mr. Scott "You will have to get a list of the names of the people from whom you bought this wool." Well, Mr. Scott said, "I will do the best I can. I am dealing with two or three hundred people and it may be difficult to get a full list but I will do the best I can." Mr. Harrod said "You will have to." He said "Mr. Harrod, that is pretty strong language. I again say to you I will do the best I can with the help of my boy. What more do you want me to do?" Mr. Harrod "You get the list, signed by the people from whom you bought this wool and if it amounts to 70,000 pounds you needn't do anything further." Now Mr. Harrod said "Mr. Scott, you will receive the regulation letter from these companies soon but pay no attention to that and I will come back and take up the matter with you, check over the names of the persons from whom you bought this wool and the amount and if it amounts to 70,000 pounds

or more we will settle, and there will be no furth trouble."

Mr. Scott then, with the assistance of his son, and the expense of about $200.00, besides the time, wh took about thirty days or more, obtained the signatur of the persons from whom he bought this wool and th amount. I will say this wool was most / bought in 192 It was unwashed wool; it was what they call hold-ov wool. It was bought at a higher value than wool was bringing in 1926. In 1926 he bought perhaps about 10,000 pounds of this wool, unwashed wool. After this Mr. Scott made up and sent to the different insuranc companies his proof of claim within sixty days, to-wit, about the 4th day of the following month. That will be produced in evidence, to save time. He performed all the conditions of the policies, and each of them incum bent upon us to be performed. We were the sole owners, unconditionally, of this property at the time it was de stroyed and at the time it was insured except the chatte mortgage of which I spoke, of which each of the de fendants had full knowledge.

Aside from the wool in the barn which burned, were 144 wool bags of a value of $57.60. The total insurance on this property that was destroyed was $28,000.00 at the time of the fire and the value was far in excess of that. Each of these insurance companies had notice of the other insurance on the property at that time.

The evidence will show that there was some other wool in that building at the time it was burned insured by some of these same defendant insurance companies but it was separted from the wool owned by Mr. Scott. That insurance has been adjusted and paid. The insurance on the barn, I think, too, was paid.

The Court: Now, just a minute. Will you give the amount of insurance on all the various policies of the defendants and when it was taken? Start with the Home.

Mr. Murphy: The Home $8,000.00. The New York Underwriters—

The Court: What was the date when that insurance went into effect?

Mr. Murphy: I will get you that. I don't have it.

Mr. Hamilton: It is in the petition.

The Court: You can get it a little later. The New York Underwriters, $3,500.00?

Mr. Hamilton: Yes.

The Court: The Westchester?

Mr. Murphy: $3,000.00.

Bill of Exceptions.

The Court: The Sun Insurance Company?

Mr. Murphy: $5,750.00.

The Court: The Norwich?

Mr. Murphy: $5,750.00.

The Court: And the fire took place September 6th, 1926?

Mr. Murphy: Yes, at 3:30 or 4:00 o'clock in the morning.

The Court: The chattel mortgage was given when, sometime in June?

Mr. Murphy: Some time in June preceding.

The Court: June, 1926?

Mr. Murphy: Yes. Your Honor, I understand now that the Home Insurance policy was not renewed on August 14th, but it was a new policy. Mr. Stottsberry issued a new policy instead of a renewal on August 14th with The New York Underwriters.

The Court: You said Home. Is it the New York Underwriters or the Home?

Mr. Murphy: That is the New York Underwriters.

Mr. Monnett: August, 1926.

The Court: State the case of the defendants.

Mr. Edmonds: If Your Honor please, at this point, after the statement of the case by plaintiff's counsel the defendant insurance companies, The Home Insurance Company, the Norwich Union Fire Insurance Company, The New York Underwriters Insurance Company, The Sun Insurance Office, The Westchester Fire Insurance Company and each of them move the Court for a judgment in its favor respectively, upon the statement of the case made by plaintiff's counsel to the jury. The ground of this motion as to the Home Insurance Company, the Norwich Union Fire Insurance Society and the Sun Insurance Office is, first, that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss payable clauses making the loss payable to the Cumberland Savings Bank. That fact is also alleged and admitted in the pleading. Plaintiff's counsel has stated that the Cumberland Savings Bank at the time of this fire was interested in this wool by way of chattel mortgage and was a part owner thereof and with those facts the cases against these three companies are cases in which the cause of action, if any, under the policies, is a cause of action belonging to the plaintiff and the Cumberland Savings Bank jointly, whereas his petition alleges the plaintiff claims a cause of action lodged in himself exclusively.

Bill of Exceptions.

Code, Section 11256, expressly provides that p
who are united in interests must be joined as pla
or defendants. As the Supreme Court held in U
vs. Ewing, 2 O. S. 14, joint creditors must be joine
all must recover or none can recover.

In Aetna Ins. Co. vs. Penn. 4 Nisi Prius, New S
page 97, first syllabus (reading)

The Court: That would be a splendid way to di
of the cases for the convenience of the Court and
but I don't think the Court could intelligently dispo
them along that line at this time.

Mr. Edmonds: May I proceed? I had one other gr

The Court: Yes.

Mr. Edmonds: The motion on behalf of The Hom
surance Company, The Norwich Union Fire Insu
Company, the Sun Insurance Office as well as the
rate motions of The New York Underwriters and
Westchester Fire Insurance Company are based
upon the further following ground, that from the
ment of plaintiff's counsel it appears that at the
these policies were issued and at the time of this fir
wool, or part, was incumbered by chattel mortgage.
pleadings allege and admit that these insurance cont
all contained provisions which provide that

"This entire policy, unless otherwise provided
agreement endorsed hereon or added hereto, sha
void, if the interest of the insured be other than u
ditional and sole ownership, or if the subject of insur
be personal property and be or become incumbered
chattel mortgage." No facts are stated by plain
counsel which void in law this admitted violation.

The Court: Motion overruled and defendants' e
tions, one and several, may be made a part of the re

Mr. Murphy: Gentlemen, I forgot to say that this
was destroyed in the same building in which it wa
sured. On the 24th day of November, 1926, the de
ant companies, each of them, sent to the plaintiff a
ment, following his proof of loss to them, in whi
stated that his knowledge—to the best of his know
and belief the fire was caused by lightning. In thi
return a copy of this, they did accept it, returning
of it and said that it was refused for the reason th
same does not state his knowledge and belief as
time nor origin of the fire. The proof of loss, whe
mitted to you, will show that Mr. Scott said there
to the best of his knowledge and belief the fire ori
by lightning striking the building and the time wa

four o'clock A. M.; they stated in that that they disagreed as to the value of the loss or damages. The Home Insurance Company, likewise these others, "disagree with you as to the amount of loss or damage caused by fire." That is all they ever did, never asked for the appointment of arbitrators, never came any more, never sent anyone and that is the first and only knowledge that the plaintiff had that there was a disagreement; says they disagree, but they did not disagree. When Mr. Harrod was there there was absolutely no disagreement and no appraisal asked for because, at the time Mr. Harrod and Mr. Scott were at the ruins, Mr. Harrod said there is nothing here to appraise, it is a total loss. Remember my statement, this was unwashed wool, the fire occurred on Monday morning Labor Day, and it smoldered and burned until the following Friday before it entirely consumed the wool. Then he demanded that we get signatures of the parties from whom we bought this wool, because the other records were burned, and Mr. Scott did and he never came back to see it. It is now, and has at all times, and is now at their disposal for their inspection. Copies, I believe have been furnished and the original is here for their inspection showing the amount of over 82,000 pounds of wool.

Mr. Monnett: May I suggest, Your Honor, inasmuch as at the close of defendant's statement that they made on behalf of each and several of the defendants, that on the part of the plaintiff the jury be directed to return a verdict for the plaintiff in each case because they do not state, and do not plead, that they have tenedered back the premiums that they received for these respective policies and still hold them; it was held here in the Laughlin case that after they sued for a void contract and kept the proceeds of the note that they are bound to make the tender before they file such answer, and in his statement this morning he does not claim that he ever returned any of these premiums that were paid for these insurance policies, but, on the contrary, holds them.

Mr. Edmonds: If your Honor please, at the conclusion of the statement of the case by plaintiff's counsel and the opening statement of the case by Plaintiff's counsel, each of the defendant insurance companies mover the Court to withdraw the case from the jury, render judgment for each separate defendant insurance company upon the statement of plaintiff's counsel for the reasons that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss pay-

J. M. Scott.

able clauses making the loss payable to the Cumberl... Savings Bank. That fact is also alleged and admit... in the pleadings. Plaintiff's counsel has stated that ... Cumberland Savings Bank at the time of this fire ... interested in this wool by way of chattel mortgage ... was a part owner thereof and with those facts the ca... against these three companies are cases in which ... cause of action, if any, under the policies, is a ca... of action belonging to the plaintiff and the Cumberl... Savings Bank jointly, whereas his petition alleges ... plaintiff claims a cause of action lodged in himself ex... clusively; and for the further reason that in violation of the terms of each policy and without consent endorsed thereon the wool or a part thereof described in the several policies was encumbered by chattel mortgage at the time of the fire.

The Court: The motion is overruled and exception for each of the defendants is noted in the record.

Mr. Edmonds: May I add one other statement to the grounds, in addition to those stated in the first motion, and that is that plaintiff's statement of the case and the reply statement admits the disagreement between the plaintiff and the respective defendants as to the amount of this loss, and that the amount of the loss has not been ascertained by appraisal.

The Court: Again the motion and the remarks in connection therewith are overruled, and the exception of each defendant is noted in the record.

Be it remembered, that the plaintiff, to maintain the issues on his part to be maintained, offered and introduced in evidence the following testimony and evidence, to wit:

J. M. Scott,

called as a witness in his own behalf, being first duly sworn, testified as follows:

Examined by Mr. Monnett.

My name is J. M. Scott, James Madison, full name, generally write it J. M. I am slightly hard of hearing. Should you or the counsel at any time not make yourselves understood, I will indicate it. I reside at Cumberland, Ohio, and in September, 1926, at Cumberland, Ohio. In 1926 I owned the property we live in, and that I had my barn on the same lot, that is the property I had in the town. The size of the area of the lot including my wool warehouse or barn and my house is about 190 feet long; it is a little longer at one end than the other, one end about 190, the other end 170. The

tion of my warehouse or barn was on the northwest corner; my residence was on the southeast corner. Mrs. Scott, my daughter, Hazel, and myself occupied the residence on the date of the fire. The room where Mrs. Scott and I slept was on the west side of the house next to the barn. The barn was about 90 feet farther west and was of frame construction 33 by 40 feet. Two rooms were used for storage. There was a basement which was only used for trunkery and the like, never used for wool. The basement contained some refuse lumber and some good lumber which had been there some two or three years. The whole area of the first story of the barn is about ten feet high, with one partition, a box stall in the southwest corner about eight feet square. Nothing in that box stall at this time. In the remainder of the first story at this time there was stored wool belonging to me except about four thousand pounds stored there in 1925 in a little space next to the stairway to which I had no title. I had about forty thousand pounds of unwashed Delano wool in that first story, some of which had been there over a a year, and some not there so long, some there possibly ten months, I bought some in November of 1925, that was all there and all my sack wool that was in there was carried over, stored in 144 sacks already packed up and ready to ship. The second story was the entire contour of the barn excepting the stairway where we went up, where we put just the loose wool, not sacked wool. "In the season of 1926, I was doing business for Johnny McCurdy Company, New York, I took and piled it up, riprapped it up in front, I threw the wool promiscuously back over that way one-half the building." No consignee wool in this story. This was all my unwashed Delano wool, from thirty-eight to forty thousand pounds.

Mr. Edmonds: Mr. Monett, if you will let us look at those policies, we probably can stipulate in the record those were the policies issued.

Mr. Monnett: Anything to shorten it, sir.

(Counsel for the plaintiff hands counsel for the defendants insurance policies.)

Mr. Edmonds: We are willing to stipulate that these exhibits are the policies sued upon.

Thereupon the insurance policies, produced by counsel for the plaintiff, were marked, for the purpose of identification, as "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4" and "Plaintiff's Exhibit No. 5."

J. M. Scott.

The Court: These are admitted on the stipulation that they are the policies on which these suits are based.

Thereupon the exhibits, heretofore marked for the purpose of identification as plaintiff's Exhibits 1 to 5 inclusive, were admitted in evidence on behalf of the plaintiff, marked "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4", and "Plaintiff's Exhibit No. 5", and are hereto attached and made a part hereof.

The Witness: The policy marked Exhibit No. 1, The Home Insurance Company, stipulates that in consideration of $101.60 premium paid by the insured, from the 6th day of July, 1926, to the 6th day of July, 1927, at noon, against all direct loss or damage by fire, I paid that amount and got a receipt therefor.

Exhibit No. 2 is the New York Underwriters Insurance policy, which is for $3500.00, rate $1.27, stipulated premium of $44.45, for the term of one year from the 14th day of August, 1926, to the 14th day of August, 1927, at noon, against loss; I paid that $44.45. This was paid to Edward Stottsberry. The Home was paid to Mr. J. M. Bracken.

Q. Where did they live? A. Both live in Cumberland; they were the agents.

Mr. Edmonds: We object.

Mr. Monnett: You admit they were your agents.

Mr. Edmonds: We admit these were the local agents that solicited and countersigned these policies. The policies speak for themselves.

The Court: Go ahead.

Mr. Edmonds: I should say, respectively signed the policies whose names they appear on.

The Court: The two individuals mentioned are respectively the agents of the two companies heretofore mentioned, The Home Insurance Company and the New York Underwriters Company.

Mr. Edmonds: Each individual being the agent for the respective company whose policy bears his countersignature.

The Witness: Plaintiff's Exhibit 3 is policy of Westchester Fire Insurance Company of New York, amount of insurance $5000.00, rate 1.48, in which the stipulated premium is $74.00, for insurance from the 1st day of April, 1926, at noon, to the first day of April, 1927, at noon; that premium of $74.00 was paid to I. E. Stottsberry.

Plaintiff's Exhibit 4 is policy of Sun Insurance Office

J. M. Scott.

Established A. D. 1910, amount of insurance $5750.00, rate 1.27, premium $73.02, in consideration of the insurance to J. M. Scott, for the term of one year from the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that amount was paid to the company.

Plaintiff's Exhibit 5, Norwich Union Fire Insurance Society, Ltd., is defendant's policy, amount of policy $5750.00, rate 1.27, premium $73.02, in consideration of the stipulations therein named to insure J. M. Scott for the term of one year, beginning the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that was paid to Mr. Bracken, the agent.

Q. I will ask you whether any of those premiums have ever been tendered back to you either before or after this suit?

Mr. Edmunds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant, the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes I thought you had answered. A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted.

The Witness: The building described in each of these policies as a two-story, slate roof frame building, occupied as wool storage on the west side of Cambridge Street, risk #50, map 117½ Cumberland, Ohio, is the building I have just described to the jury, and these are the buildings that contained the wool I have insured. These policies all cover the same building, or the wool rather.

There is on Exhibit No. 1, attached on the face of said policy, the following: "Uniform Standard Ohio, Form No. 111, Loss Payable Clause. Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, O. Agency.

J. M. Scott.

Dated June 6, 1926. J. M. Bracken, Agent." and upon the policy at the date it purports to be.

There was attached to plaintiff's Exhibit No. 5 about June 24, 1926, "Uniform Standard Ohio, Form 111, Loss Payable Clause. Any loss under this p that may be proved due the assured shall be payab the assured and The Cumberland Savings Bank Co., ject, nevertheless, to all the terms and condition the policy. Attached to and forming part of Policy 223 of the Norwich Union Fire Insurance Society, York, issued at its Cumberland, O., Agency. Dated 24, 1926. J. M. Bracken, Agent."

On June 24, 1926, there was attached to policy hibit No. 4, "Uniform Standard Ohio, Loss Pay Clause, Form No. 111. Any loss under this policy may be proved due the assured shall be payable to assured and The Cumberland Savings Bank Co., C berland, Ohio, subject, nevertheless, to all the terms conditions of the policy. Attached to and forming of Policy No. 2 8271 of the Sun Insurance Office, C cago, Ill. issued at its Cumberland, Ohio, Agency. D June 24, 1926, J. M. Bracken, Agent."

The nature of my indebtedness to the Cumberl Savings Bank Company was a chattel mortgage on fo some thousand pounds of wool at the price of that p of wool to secure the money that I had borrowed out the bank; only needed to borrow for my wool busin

Q. Can you state to the jury what was the amount tained in money from the bank on which these pledged in security to that amount? A. Well, I do know whether I could or not until I look here, I wo have to add them together.

Q. Take the three I have given you, can you t them?

Mr. Edmonds: We object, if your Honor please, question of how much of the indebtedness was secur by this chattel mortgage is a simple question. I do see what bearing that has on the policy.

The Court: Do you know how much money you b rowed on the chattel mortgage?

The Witness: I have in mind about $19,000.00.

The Court: That is near enough.

Q. Does that include these three?

Mr. Edmonds: We object.

A. That includes what I have in the Cumberland inga Bank.

The Court: Objection overruled; exception.

J. M. Scott.

Q. Was Mr. Bracken connected in anywise with this Bank?

A. He was cashier of the bank at that time.

Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on the policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that, the evidence propesode to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an encumbrance by chattel mortgage, the entire policy shall be void, whereas the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court. The defendant's exceptions may be noted.

(Question read)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I had borrowed from them. Now, let me just—

J. M. Scott.

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said, "If you do, I will go to the office." He had company at home; his office was in the First National Bank of our town. I said, "No, it isn't necessary, you can write it out Monday morning and mail it, so I will get it through the mail; I am away from home during the week, and I will send you a check for the money," which he did.

Mr. Edmonds: Motion to rule out the answer and each part thereof, on the ground that it is a violation of the parol evidence rule.

The Court: You don't have to restate these reasons, we haven't time to listen to any dissertation upon it each time. Your motion to exclude the answer is overruled and your exceptions are noted, for the reasons announced in the objection to the question.

Q. I will ask you the same question, as to what, if anything, was said to I. E. Stottsberry, the agent's name appearing at the bottom of the policy, Exhibit No. 3, Westchester Fire Insurance Company, as to there being any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this question as the former, and the same reasons announced, and the court overrules the objection and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy, which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Monnett, possibly the conversation took place on Saturday, and I expect that policy will be dated on Monday, I remember very well I went down to his home, it was on Saturday evening.

J. M. Scott.

Q. Had that lien existed on there up as early as the other Policy, April 1, 1926? A. No, sir.

Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court: Objection overruled; exceptions noted.

The Witness: He did not.

(Narrative continued) The fire occurred on September 6, 1926, about four o'clock A. M. The first I knew of it Mr. Yoho who lives below us hollered fire; I got out of bed and went downstairs. The fire was coming out of the second story, out of the south window; that window had poultry wire over it, we put it there years before, and when storing wool, it was there for ventilation; it looked like the flame was coming out about twenty feet long. Mr. Yoho at this time was out on our back porch. I couldn't tell who else was there. We went to notify the fire department; we have just a chemical fire engine. Every available effort was made to stop the fire. The fire entirely consumed both the wool and building. I have some samples in my grip, about all that was left of the wool.

Q. At the request of counsel, did you bring that with you, and if so, you may produce a sample of the residuum?

(Witness produces cinders wrapped in a paper and exhibits them to the court and jury.)

The Court: I understand he brought this?

Mr. Monnett: We asked him for any sample of ashes left.

The Court: You asked him, Mr. Monnett?

Mr. Monnett: Yes.

The Witness: I just did this up kind of hurriedly, there is about all that was left, that was the condition of the cinders that was left.

The Court: Put it on the floor.

Mr. Edmonds: If your Honor please, how could this get in the record?

The Court: I think we will put a string around it and mark it as an exhibit and give it to the reporter; I don't care what he does with it.

Mr. Monnett: I have presented here a package that my client brought at our request, the residue or residuum

J. M. Scott.

of this fire, and ask the court to mark that Exhibit No. 6, and offer it in connection with this witness' testimony.

Thereupon the cinders, last above produced by the witness, were offered, introduced and admitted in evidence on behalf of the plaintiff, marked Plaintiff's Exhibit No. 6, and are attached hereto and made a part hereof.

(Narrative continued) These cinders were about two feet thick and covered about two-thirds area of the barn. It took from Monday until Friday to so extinguish it as to leave it in this condition. The first thing I did in the way of communicating with the company, or any of its agents, I notified the agents that day, the local agents, and Mr. Bracken, the agent of these three companies, was in Cincinnati at the time, but Mr. Stottsberry and Mr. Claypool was assistant manager in the bank, and he communicated with those three companies; I don't know that the agents ever made any examination. Mr. Stottsberry came the next day; I don't remember how long he stayed; he didn't make much of an examination; he was on the premises while they were still smoking and burning; he lives in the city. His agency is three or four hundred feet from this place. He stays in the bank. The bank wasn't so far, about two hundred yards. This was smoking and burning from Monday to Friday. To the best of my knowledge he remained in the city two hundred yards away all that time. When Mr. Bracken, the agent, was home, his home would be a little bit farther away, and he was in Cincinnati at the time, don't know when he returned, not for a week I think. I do not think he had anybody from his bank there. Mr. A. C. Harrod; came I think he arrived the 13th or 15th of the month; the fire was the 6th; six or seven days after that he arrived. The first time he was there, I didn't see him, but he left word at my home for me to write him at Columbus. I was out in the country buying wool for Mr. McMurdy, by the time I got home and before I had time to write him, I saw him. You might call that his second visit to Cumberland. I can not give the approximate date I was there and he was there. I think that was the 16th or 17th of the month, maybe the 18th. I can't say to that.

Q. State to the jury as fully as you can and the best you can; from the time he came and left, what was done between you and him? A. The first notice I had of his being there, he sent Mr. Stottsberry down, one of the agents, to me, and he said, Mr. Harrod, the adjuster was up at the bank and wanted to see me. I went

with Mr. Stottsberry, went back in the directors' room of the bank where they were sitting and was introduced to Mr. Harrod, and after possibly a remark or two was made, he produced this paper that they say I signed, which I did, that they call a waiver, asked me to read that over and sign it if I would. I read it over, and I thought, the most significant thing I seen in it was —

Mr. Edmonds: We object.

Q. State what conversation you had with him about it? A. I told him I didn't see anything wrong about signing that paper and signed it.

Q. What then took place? A. He asked me questions, about the fire.

Q. Can you give the jury the dialog about the fire as near as you can; what he asked you and what you replied? A. He asked me questions of the wool I had.

The Court: Now the plaintiff in this action has testified he signed a waiver or paper, which necessarily will have to be construed before we get through. At this point, why don't you produce that and get it in the evidence, so we will have it in an orderly way?

Mr. Monnett: We served notice on them to produce it.

Mr. Edmonds: You have a copy of it, haven't you?

Mr. Monnett: No, I thought we had it here.

Mr. Edmonds: You had a copy and retained it at the time it was signed.

The Court: Have you the original?

Mr. Edmonds: It was in triplicate, we have a copy, if they can't produce it.

Mr. Monnett: We served notice on them.

Mr. Edmonds: At your request, the defendant produces the non-waiver agreement.

The Court: No, at the order of the court.

Mr. Edmonds: Yes, the order of the court.

Mr. Monnett: This seems to be the original.

Thereupon the paper writing, last above referred to, was for the purpose of identification, marked plaintiff's Exhibit No. 7, and was offered in evidence by the plaintiff and was admitted by the Court.

Q. This purports to be on the 15th of September, 1926, J. M. Scott.

The Court: 15th of September.

Q. Yes; J. M. Scott, and then below that, Companies in interest, A. C. Harrod, Adjuster; now after—

The Court: Now, let's see, there is an assumption on the part of the adjuster to represent all five companies. Do you make any question about that?

J. M. Scott.

Mr. Edmonds: As to his authority to sign th
it is stipulated that he had authority to sign that
ment on behalf of each defendant insurance comp

The Court: Then over and above the five la
filed in this court, in each there is a common p
and in each the subject matter of the contest is o
loss by fire on September 6th, of the wool and the
ing. I say, over and above that, we find that al
panies are represented by one common individual
mon adjuster. That might be announced as a f
reason on the part of the court in consolidating an
ing these cases together.

Q. Subsequent to this waiver, what was done
way of Mr. Harrod requesting you—

Mr. Edmonds: Subsequent to this waiver; it is a
waiver agreement, you call it a waiver.

Mr. Monnett: Exhibit 7. The court has held ye
waive a waiver, as well as an original contract.

Mr. Edmonds: My objection is that you are not q
nating it correctly.

Q. I will call it No. 7; what, if anything, was
between you and Mr. Harrod, representing these
companies, subsequent to this to determine the val
the loss of this property; state what took place in
own way. A. Well, he asked me questions as to
amount of wool I had and jotted them down.

Q. The amount of the wool in your policies? A.
the amount of wool I had consumed in the fire.

Q. Insured in the policies? A. Yes.

Q. He asked you the amount of wool as to what,
what about it?

The Court: That is a wrong conclusion. The qu
here is whether the wool that was burned was in
or was not. The other side claims apparently it wa
insured. Under the various conditions of the po
there was no liability, if there was no liability, no
ance on it.

Mr. Monnett: On the other hand, if they take the
tion of no insurance, they can't be heard to ob
we made no proof then.

The Court: Object to what?

Mr. Monnett: They can't object to proof if we
none, if we made no proof.

The Court: The form of the question was the
here.

Q. State what was said by this adjuster, betwe

further, as to the fire, give it in order the best you can [illegible] start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and during the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: In so far as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted.

(Narrative continued) My conversation with Mr. Harrod began after I signed that waiver, number 7; he asked me about the amount of wool and if I was the sole owner of it and all those questions. I answered "I am not certain about the amount of wool I had, Mr. Harrod." I said "My books were all burned, I kept my books in the barn and in the wool storage room", "my accounts were all burned. I am only giving from memory, but I had from seventy to eighty thousand pounds, I couldn't tell you, but I am satisfied I had seventy thousand, I believe I had eighty." He put this down. After he talked and asked these questions, he dismissed the two local agents and they went out of the room. They had not any more than gotten out of the room, when he took a lead pencil out of his pocket, looked at me and said, "Scott, you know you didn't have eighty thousand pounds of wool in that barn, it wouldn't have burned, another thing, that it wouldn't have held it." My answer was "Mr. Harrod, I didn't say I had eighty thousand pounds of wool [illegible] said I believed I had, I said to you I knew [illegible] of seventy thousand pounds of wool in [illegible] and I had a standing offer from Mr. McMurdy

for forty-five cents a pound," I know it burned." [illegible] answer was "I would like to make measurements of [illegible] barn, will you help me?" and I said "sure", and [illegible] down with him. He proceeded first to measure [illegible] foundation by pillars of the entire countour of the [illegible] the contour of the barn was still traceable. He prod[illegible] a tape line; I carried the tape line. I don't know [illegible] measurements he took, I carried the tape line for [illegible] I put it where he ordered me to take it. I couldn't [illegible] if he made substantially correct measurements, so [illegible] as running the tape. After that he asked me to [illegible] him where the wool was located in the barn by pil[illegible] still located there, which I did. The pillars were p[illegible] mostly set in cement foundation. I am speaking of [illegible] stone and brick, the posts were consumed. He wa[illegible] me to explain where the two different bunches of w[illegible] the sack wool and the wool upstairs in the second st[illegible] were located, and the wool in that first story, which [illegible] proceeded to do, taking the foundation as a guide. [illegible] proceeded to sow first where the one hundred and fort[illegible] four sacks of wool were, designating this box stall in [illegible] corner which had no wool in it. Then, I proceeded [illegible] give him the dimensions of the upstairs. I have lo[illegible] one hundred and eighty-five thousand pounds of w[illegible] out of that barn at one time, I explained that to him [illegible] in the bank. After we got through the measureme[illegible] I said "Mr. Harrod, I want to call your attention r[illegible] down there", showing him where I took the wool on [illegible] Saturday before the fire for Mr. McCurdy; I say[illegible] has written me repeatedly there would be some salv[illegible] possibly damaged by ——. I was buying wool for [illegible] McMurdy in that season. I was putting it there. [illegible] wool was all taken out of there on the 28th of Au[illegible] and on the 4th of September I began putting in [illegible] for Mr. McMurdy, that is the Saturday before the [illegible] I mean all the McMurdy wool was taken out of [illegible] barn; then on the 4th of September I began takin[illegible] wool in the afternoon for Mr. McMurdy again. I [illegible] no help and I piled it on the first floor, and I inte[illegible] to put it upstairs, always put loose wool up in the se[illegible] story. I told Mr. Harrod that Mr. McMurdy had [illegible] peatedly written me and I have repeatedly written [illegible] there was no salvage left, it was an entire loss." [illegible] Harrod said "Yes, whatever is there is an entire [illegible] He did not go around and examine these cinders. [illegible] in view. I believe he did take a stick and stir [illegible] He had me walking around and he remarked "[illegible]

had to have you walk around through there." It was all visible to him. There was no salvage at that time and no wool left that was not consumed.

Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that the parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can save your exceptions.

Q. What requirement did he then make of you? A. He asked me, he said, "Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them." I says, "I will do the best I can," I says, "I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment." I had bought before this and shipped several carloads the same season. He said, "You can remember." I says, "It is a pretty big thing," I says—I told him I would do the best I could.

Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the best I could, and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

Q. You may state to the jury— A. I haven't told you all.

Q. Go ahead? A. Then he says, "Well, Scott, I wouldn't know any way to say but the one, you have to." He says, "It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss."

"Well," I says, "I recognize that fact, but", I [illegible] "Wouldn't my oath amount to something in it?" [illegible] said the oath wouldn't do. I says, "I will still say [illegible] I said prior to this, I will do the best I can." I [illegible] "I don't know how soon I can do it; we will go right [illegible] it. I will go and see my son and go at it." I says, "[illegible] roads are in such a condition, we can't travel by [illegible] mobile."

Q. Unimproved roads? A. Yes, unimproved roads. He says, "That is about all that can be done until you get that proof of loss, and I will come back and check up with you sometime." I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, "Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me?" and he says, "No." He says, "You get that gathered up, Scott, and there will be no trouble; we will have a settlement." He says, "In the meantime you will get a form like that we usually send out, but you pay no attention to that, you go right ahead and gather up this wool." I says, "I will do it."

Motion by counsel for defendants to strike out each and every part of the answer on the same grounds.

The Court: Same ruling and same exception.

Mr. Monnett: I ask the stenographer to mark these papers in their order.

Thereupon paper writings, produced by counsel for the plaintiff, were, for the purposes of identification, marked "Plaintiff's Exhibit 8", "Plaintiff's Exhibit 9", "Plaintiff's Exhibit 10", "Plaintiff's Exhibit 11", "Plaintiff's Exhibit 12", and "Plaintiff's Exhibit 13".

Mr. Monnett: I have here some manuscripts, beginning with Plaintiff's Exhibit 8 to Plaintiff's Exhibit 13 inclusive, which says, "Cumberland, Ohio, November [illegible] 1926. We, the undersigned, residents—

Mr. Edmonds: We object to counsel reading it; may we look at the document?

Mr. Monnett: Yes (handing same to counsel). They went out in compliance with their request and got the amount of wool from each of the purchasers.

The Witness: Everyone, the farmer's own signature, his own handwriting.

The Court: What is the objection to this?

Mr. Edmonds: We haven't seen them, your Honor would like to look at them.

J. M. Scott.

The Court: While you are looking those over and deciding, we will take a recess for the noon hour.

Thereupon a recess was taken until 2:00 o'clock P. M. the same day.

Wednesday Afternoon Session, June 13, 1928.

And also

J. M. Scott,

resuming the stand, testified as follows:

Examined by Mr. Monnett:

Q. I now hand you these Exhibits and will ask you to look at them and state what you have had to do with them and what they are. A. This is the poundage of wool that we gathered up from different men.

Q. Does that represent the vendors or salesmen that sold the wool to you that was in this warehouse? A. Yes.

Q. Are those the names and the amounts and the dates that are attached on there? Do they represent the time that the particular men signed? Is that what Adjuster Harrod requested you to furnish?

Question objected to by the defendants as leading.

The Court: That is objectionable; he has already testified to that.

Q. Look them over; take No. 8 and state what ones of them personally obtained and what ones your son obtained, if you can. A. I obtained all on No. 8. Those are all those men's signatures.

Mr. Monnett: I will not take time to read them now.

The Court: They are not in evidence.

Q. What is the next one? A. It is No. 9. My son, I think, procured all of these.

Mr. Bibbee: What do you mean by all of these?

The Witness: I mean on this sheet.

Q. All the names on No. 9, you think, were your son's? A. Yes.

Mr. Monnett: I will mark that S.

Q. Take No. 10? A. No. 10, my son procured those.

The Court: I think you are wasting time.

Mr. Monnett: I would like to make the proof of these two, because under our rulings, if they required and they anticipated they did, they waived their rights.

The Court: The question would be on the competency of those to go in evidence.

Q. State to the jury after you examine them whether you can state that was the amount of wool that was sold to you and delivered to you and that was in the warehouse? A. This is part of it.

J. M. Scott.

Q. To that extent, it was in there? A. To that tent it is that much.

Mr. Monnett: We offer that in evidence.

Mr. Edmonds: We object on the following grou it is an attempt to show a waiver here by someth other than an endorsement on the policy. Second view of the non-waiver agreement such evidence waiver as here offered is incompetent. This is sim hearsay statements of the persons whose names here pear. The parties are not here for cross examinat

The Court: Exhibits 8 to 13 would not be compet to show what you are attempting to show. The w ness is on the stand testifying. He may refer to memorandum and state of whom he bought wool when he bought it and the aggregate amount of w he bought.

Q. After you examine that will you state to the co and jury of whom it was you bought and the quanti and about the time that it went into this warehouse? C. E. Knowles, 1395 pounds, July 11th, 1926. J. Young, 3170 pounds, Auguth 28th, 1925.

Mr. Edmonds: We object, it does not appear that th document refreshes his recollection.

The Court: Objection overruled and your exceptio may be noted.

The Witness: J. A. Young, 3170 pounds, August 2 1925.

Q. Does that refresh your recollection? A. Yes. B. Spooner, 790 pounds, July 14th, 1925. J. D. Coll & Sons, 1787 pounds, August 13th, 1925. John Lesto 519 pounds, July 11th, 1925. C. E. Bundy, 452 poun July 11th, 1925. Herbert LePage, 398 pounds, July 1925. Garvin Brothers, 468 pounds, July 18th, 1 S. Braut Bliss, 1200 pounds, plus, July 24th, 1925. W. Cellers, 420 pounds, 1925. W. G. Pryn, 240 pou

Q. Do you know these men personally as being the m from whom you bought this wool? A. I do; I know those men personally.

Q. Take up any one of these others and state whet you got them or not, and state, after examining th which ones you got? A. Some might be a little hard for me to read.

Q. Look them over, be careful about them and if t are any of those that you know personally about, s them and the amount of wool? A. J. B. Allison, pounds. I had forgotten the date but that was That was wool that I bought with my personal ch

J. M. Scott.

Mr. Edmonds: The defendants object; the witness is now obviously just reading the list, reading a list that he did not get.

The Witness: I secured this one.

The Court: He is testifying to a fact that he bought wool of these various parties and the quantities of wool. I do not know what may develop on cross examination.

The Witness: H. E. Kreight, 286 pounds, July 23, 1926. E. E. Buckey, 360 pounds, July 23, 1926. I procured all of those.

Q. Were those delivered to your warehouse? A. Yes, those were all bought in 1926.

Q. I call your attention to Exhibit No. 10, keeping them in order; examine that and state whether that refreshes your memory as to whether you bought of those people and that amount of wool was delivered to your warehouse? A. My son got this one but I know these men and I know about the wool.

Q. Give the amounts as near as you can? A. A. F. Crawford, 410 pounds, July 10th, 1925. E. L. Watson, 1250 pounds, August 10th, 1925. W. E. Davidson, 330 pounds, July 10th, 1925. E. L. Stewart, 660 pounds, August 8th, 1925. J. D. Nelson, 800 pounds, July 10th, 1925. E. R. Sims, 300 pounds, July 18th, 1925. W. C. Aikin, 703 pounds, July 10th, 1925. C. H. Ziler, 938 pounds plus on and after August 8th, 1925. D. S. McNutt, 954 pounds, July 11th, 1925. M. D. Wheeler, 105 pounds, July 11th, 1925. H. S. Johnson, 750 pounds, plus. He has that on after July 11th. J. C. Paisley, 450 pounds, July 18th, 1925. J. D. Paisley, 306 pounds, July 18th, 1925. Lewis McIntre, 600 pounds, July 18th, 1925. C. C. Johnson, 2250 pounds, July 18th, 1925. There is a name I can't get and it looks like "Flowers," 700 pounds, July 9th, 1925. J. C. Starrett, 525 pounds, July 11th, 1925. S. J. Alexander, 735 pounds plus, July 11th, 1925. I know all these men except that name there, I can't make out.

Q. Was this wool delivered to your warehouse? A. Yes.

Q. I call your attention to Exhibit No. 11 and will ask you to examine the names and amounts and refresh your memory and state to the jury, if you will, whether that was received in your warehouse and the quantities? A. This I got part and my son part.

Q. Do you know, after looking at that, that is the amount of wool that you received? A. Yes.

Mr. Edmonds: We object to the form of the question.

J. M. Scott.

The Witness: James R. Spratt, 720 pounds, Aug[illegible] 18th, 1925. S. R. Gregory, 340 pounds, August 2[illegible] 1925. C. J. VanReeff, 240 pounds, July 11th, 1925. [illegible] H. Pollock, 1310 pounds, July 11th, 1925. I. B. Wil[illegible] 650 pounds, July 11th, 1925. There is a name I can[illegible] get, 966 pounds, August 28th, 1925. R. E. Watson, 1[illegible] pounds, July 16th, 1925. W. W. Harris, 340 pound[illegible] August 15th, 1925. E. E. Galloger, 1655 pounds, Augu[illegible] 28th, 1925. S. J. Shepler, 900 pounds, July 11th, 192[illegible] Carlos Cooper, 655 pounds, July 20th, 1925. W. C. Gl[illegible] 408 pounds, July 18th, 1925. W. S. McCracken, [illegible] pounds, July 20th, 1925. Wm H. Huffman, 2312 pound[illegible] August 22nd, 1925. E. V. Few, 248 pounds, July 18[illegible] 1925. That name, I want to state to the jury, I wro[illegible] myself with his authority. That is the only one I wro[illegible] C. L. Reed, 680 pounds, July 18th, 1925. P. L. Varne[illegible] 387 pounds, July 11th, 1925. R. F. Clapper, 728 pound[illegible] July 11th, 1925. John Harkness, 750 pounds, July 14[illegible] 1925. George Echelberry, 376 pounds, July 11th, 192[illegible] W. A. Johnston, 987 pounds, July 18th, 1925. G. [illegible] Hupp, I don't get these figures, they look like 4[illegible] pounds, July 29th. J. W. Long, 615, August, 192[illegible] There is no date only August.

Q. Did they deliver that quantity of wool? A. Ye[illegible] and that is all their own signature, as far as I know, on there.

Q. And is that part of the wool that was burned? A. Yes.

Mr. Edmonds: We move that the Court rule out the statement that is all in their handwriting.

The Court: That may remain in.

Mr Edmonds: Exception by each of the defendants.

The Witness: Elwood Laughlin, 1196 pounds, July 19th, 1926. John McCormac, 2081 pounds, July 12th, 1926.

(Narrative continued) Yes, I know those men and that wool was delivered to me and the amounts. I would like to make some explanation why I have some wool in 1926 in there, and that is this, John E. McMurdy, I buy for a manufacturer by the name of John McMurdy of New York. I have a signed contract when I buy wool for him I can't buy for anyone else, but when I was not buying for him I had the privilage of buying for myself. That is why I got this wool in 1926. Sometimes he would stop me from loading up with more wool. I had a little over 82,000 pounds. I was paying 40 cents a pound at the time of the fire. The wool I had in [illegible]

J. M. Scott.

warehouse at the time of the fire was worth 42 cents a pound, a little over $32,000.00. I am not positive just what wool bags are worth at the present time. At the time of the fire I think they were worth about 60 cents to a dollar apiece. There were 144.

Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the grounds heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exception noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said a while ago, through mud roads where he could not go by automobile.

The Court: Of course all we care for here is that they went around to the various farmers to find out how much wool they had purchased and of whom they had purchased it.

Mr. Monnett: There is another phase as to a certain line of authorities that if they had to spend time and money at their request that they are recognizing the existence of the policy and that is a question of estoppal if they ask them to do a certain thing.

The Court: You are not trying to recover for the expense?

Mr. Monnett: It is just a question of estoppel. It is in the record that this was done at the instance of the adjuster in order to determine how much wool was in that building which burned.

Q. How many days did that take, about? A. It took my son something like forty days; I did not spend that much time. I went by train and went out to the country and came back on the train. Mrs. Scott was in such a condition I did not want to stay away over night.

Q. I will ask if, in addition to this, you furnished in writing and under oath for each company, about October 4th, a notice of your loss? A. I did.

Mr. Monnett: Have you those originals that we served notice for you to produce?

Mr. Edmonds: He did not serve notice designating anything of that kind.

Mr. Monnett: We gave a very broad notice.

The Court: Have you carbon copies of the letters that were sent?

Mr. Monnett: Yes, we have.

Q. I will ask you if you had prepared and sent on or about the 4th day of October, proofs of the notice of the loss by fire to these respective companies?

Mr. Edmonds: We object; the papers will speak for themselves.

The Court: Answer that by yes or no.

Mr. Edmonds: Exception.

The Court: The question is, did you on or about the 4th day of October send to the various companies who are defendants here proof of loss.

The Witness: Yes.

Q. Are these carbon copies of the same you swore to? A. I couldn't say as to the carbon copy part. They are copies of what I swore to.

Mr. Edmonds: These papers presented have a lot of other matter on them.

The Court: The memoranda does not have anything to do with the exhibit.

Mr. Edmonds: If your Honor please, we have and will produce the originals if you wish.

The Court: They asked you that awhile ago but you said it was not included in the notice.

Mr. Edmonds: It was not, but I offer to produce it anyway.

The Court: Let us have the originals.

Mr. Edmonds: Here they are, each one to a different company.

The Court: The one addressed to the Home Insurance Company may be marked Exhibit 14; the one addressed to the New York Underwriters Company Exhibit 15; the one addressed to the Westchester Fire Insurance Company Exhibit 16 and the one to the Sun Insurance Office or Company as Exhibit No. 17 and the other to the Norwich Insurance Company as No. 18. Those are proofs of claim, are they?

Mr. Monnett: Yes.

The Court: All dated October 4th.

Mr. Monnett: I think so, yes, received on October 18th, according to their stamp, 1926, Wm. N. Banks, General Adjuster. I do not think the record shows that we had formally offered the five policies, although they were admitted in the pleadings.

The Court: Yes, they have been offered and the exhibits have been offered and admitted except 8 to

J. M. Scott.

were excluded. 14 to 18 are the present items of business. Are you offering those?

Mr. Monnett: Yes.

The Court: They may be admitted.

Mr. Edmonds: Each of the defendants object to the introduction of Exhibits 14 to 18 inclusive upon the ground that the papers do not show compliance with the requirements of the policy.

The Court: The papers show what they show and they are useful in evidence up to the limit of what they show. If they are defective, that is another proposition. Your objection is overruled and exception noted.

Mr. Edmonds: Exception by each of the defendants.

And thereupon the proofs of loss sent to respective insurance companies were admitted in evidence on behalf of the plaintiff and are herewith submitted marked Plaintiff's Exhibits 14 to 18 inclusive and made a part hereof.

Q. The foundation structure, just describe the walls and what was the condition of those walls after the fire.

The Court: The foundation did not burn out?

Mr. Monnett: He says the way they were built there was a bigger draft because of being open on three sides.

The Court: It does not make any difference how much draft there was if it burned the building down.

Mr. Edmonds: The non-waiver agreement, is that in evidence?

The Court: The non-waiver agreement is in evidence.

Cross Examination.

By Mr. Edmonds:

Q. Mr. Scott, you have spoken, on your direct examination of a chattel mortgage which you executed to the Cumberland Savings Bank Company of Cumberland, Ohio. I hand you a paper which the stenographer may mark for identification as Defendant's Exhibit A, and will ask you to state whether that is the original chattel mortgage which you executed to the Cumberland Savings Bank?

A. Well, I would say it was because it is my hand write.

Q. That is your signature at the bottom? A. Yes.

Q. And your wife's signature? A. Yes.

Q. That is the original chattel mortgage to which you referred?

Mr. Monnett: We object to calling it the original chattel mortgage because it is not verified by the guaranty and under the statute it is void except between parties

and, so far as they are concerned, it is no mortgage at all. This has never been verified by the bank so that could not be held to complain.

The Court: I do not think we can regulate that claims. There is not anything before the court.

Mr. Monnett: The point I make is, if they are objecting that the real parties in interest should sue, that would not sue because they had no chattel mortgage to sue on.

The Court: We will pass that point.

Mr. Monnett: I want to save the record.

The Court: It has not been offered in evidence.

Mr. Monnett: It is a void chattel mortgage so far as the bank is concerned as against this insurance company. They would have to pay it to us in any event.

Mr. Edmonds: We offer defendant's Exhibit A as part of the cross examination of the witness.

Same objected to by the plaintiff.

The Court: It may not go in evidence.

Mr. Edmonds: On the ground of the order?

The Court: Yes. It is part of your own case.

Q. How much, at the time of this fire, was due from you to the Cumberland Savings Bank Company, Mr. Scott, on the indebtedness secured by this chattel mortgage? A. I said I thought about $19,000.00. I don't know exactly, maybe not quite that much, but in that neighborhood.

Mr. Edmonds: Will you produce the letter requested in our demand and subpoena duces tecum rejecting the proofs of loss in these companies?

(Here same is produced.)

Q. I hand you, Mr. Scott, Defendant's Exhibits B to F inclusive, which have been produced by your attorneys, and ask you to state whether, after you had submitted the sworn statements which you have identified as Exhibits 14 to 18 inclusive, whether, after you had submitted those statements to the insurance company you received these exhibits, B to F inclusive, from the several defendant companies in these cases.

Mr. Monnett: We object because they waived that by recognizing the existence of the policy and requiring this separate proof of loss as indicated in the testimony.

The Court: That objection will be overruled.

Mr. Monnett: Exception.

Q. The question is, whether you received these from the various companies? A. Yes, I received them.

Q. And you received them about the dates that they bear, November 24th, 1926? A. I couldn't say as to that. I suppose I did. I couldn't say as to that.

Q. I call your attention to the registered date stamped on the backs of the envelopes attached to these Exhibits, the date of November 24th, 1926, and will ask you if that date stamp refreshes your recollection, approximately, as to when you received these letters? A. No, it does not refresh it, but I believe I received them according to that stamp.

Mr. Monnett: Same objection.

Mr. Edmonds: Defendants offer in evidence Exhibits B to F inclusive as a part of the cross examination of this witness.

Mr. Monnett: We object.

The Court: Objection sustained.

Mr. Edmonds: Again on the ground of the order?

The Court: Of the order. Those exhibits, however, I might say, should have been presented to the other side and gone in as part of the record in chief so that the whole of the case would be before the Court before the close of the testimony.

Mr. Edmonds: Our theory was, inasmuch as they had raised on direct examination the matters as to which these documents were pertinent it was proper for us to go into them on cross examination and therefore I offered them as part of the cross examination.

Mr. Murphy: The reason we did not, we did not know whether or not they were sufficiently identified and we have other evidence to identify them and that we were going to offer them in evidence.

The Court: It appears they have been sufficiently identified.

Mr. Murphy: They may be offered in evidence, then.

The Court: As part of the plaintiff's case?

Mr. Murphy: Yes.

Mr. Edmonds: That is, I understand, Mr. Murphy, then the record shows that the plaintiff offers in evidence Exhibit B—

The Court: No, the record shows that the plaintiff offers in evidence as a part of the examination of the plaintiff himself Exhibits 19, 20, 21, 22 and 23. 19 refers to the reply from the Home Insurance Company; 20 will be the New York Underwriters; 21 the Westchester Insurance Company; 22 the Sun Insurance reply and 23 the Norwich Union Fire Insurance reply.

And thereupon the papers above identified were ad-

mitted in evidence on behalf of the plaintiff and herewith submitted marked Plaintiff's Exhibits 19, 21, 22 and 23 and made a part hereof.

Mr. Edmonds: And this chattel mortgage, do I understand that they are also offering that?

Mr. Monnett: No, sir.

(Narrative continued) On January 1st, 1926, I had in this barn about seventy-two or seventy-five thousand pounds of wool. I kept all of that. The wool that I bought in 1925 I paid forty-five to fifty-three cents. The price of wool on the market at the time of the fire was forty-one to forty-two cents.

Q. So that if you had sold the wool which you had accumulated in the year 1925 at the market price of [illegible] you would have stood to suffer quite a substantial loss, wouldn't you?

Mr. Monnett: You would have to determine the value, just what the value was, whether you lost or made.

The Court: I think that is so. If the price had gone up you would have made money and if it went down you would have lost money. That has not anything to do with the issue here that I can see. Objection sustained.

Q. How much wool did you purchase during the year 1926, up to September 6th, when this fire occurred, of your own? A. Six to eight thousand pounds—nine or ten—from six to ten thousand pounds.

Q. But you would not tell the jury any more definitely than that? A. I read off those names.

Q. I am not asking you that now. A. From six to ten thousand pounds.

Q. You cannot be any more definite?

Mr. Murphy: He has given it exactly.

The Court: He has reiterated it twice from six to ten. He said he had about eighty-two thousand pounds on at the time of the fire and he had from seventy to seventy-two thousand the first of January and he added enough to it to make the total of the eighty-two thousand, which he says was from six to ten thousand of his own.

(Narrative continued) I was not buying wool for the John McMurdy Company of New York in 1925. I began buying wool for them, I expect, about the first of June, 1926. I would say that in 1926 I purchased on behalf of the John McMurdy Company three hundred thousand pounds of wool. I did not put all of that in this barn when I purchased it. I put part of it in there.

business through this barn for John McMurdy Company in 1926. I had my own wool and I had McMurdy's wool in there in 1926. The tablet that I used for a record of the purchases made for John E. McMurdy was kept in the barn. But when I was buying for anyone else I always used a kind of a double precaution and I kept the record that had the names on, every man's name that I purchased from and the amount of pounds, I kept that in a bookcase at home. The tablet part of the record of the transactions for John E. McMurdy I kept in the barn. I counted up on the tablet and every Saturday I transferred that to a book. I kept that book in my house. I only used tablets for the records of my own purchases on my own account. I kept that in this barn and that was burned up in the fire. After the fire I didn't have anything to show for the receipts of the men who had the wool stored there. I had wool stored in there for other people, amounting to four thousand pounds, outside of McMurdy's wool. I just finished taking in seven hundred and some odd pounds of wool for McMurdy. That is all the McMurdy wool I had there, I took that in on Saturday afternoon. When I purchased this wool in 1925 I kept a separate bank account of my own purchases in the Government Savings Bank. The wool that I bought in 1925 I paid for most of it by check. If a man wants it for cash I give it to him. I am not able to produce the cancelled checks for those payments for the 1925 purchases, as they were burned in the fire. I also kept my bank checks in the barn; all my business was kept in there and I had my office in there in the northeast corner; took up about six foot square space. A box stall was in the opposite corner. There was about forty-one thousand pounds of wool on the first floor. About two-thirds of the floor space on the first floor was covered with wool, and went about ten feet high. The wool on the second floor went about nine feet high and covered very nearly a half of the floor space, not quite the half. Yes, it went up to the level where the roof began, went way above that, just about six feet up to where the level was and I said eight to nine feet. I know it was higher than I could reach up.

I talked to Mr. Harrod twice. It is true I said this morning that some one told me that he had been there, but I did not see him the first time. I saw him twice. I saw him when he came back to make the settlements

J. M. Bracken.

with these men that had this wool stored there, the second time I saw him.

It would be pretty hard to tell the average weight of each fleece of wool, one bag. I would say about eight pounds to the fleece. The average weight of the wool in the bags, per bag, all depends on the season of the year they bag it. When wool is bagged in the summer time, it is one thing. In the winter the grease is kind of frozen and it don't pack so tight. We have had many a car of wool that is over two hundred and eighty pounds, per bag. I loaded one hundred car loads this year and they averaged over two hundred and eighty pounds.

Re-Direct Examination.

By Mr. Monnett:

After I had prepared this statement for Mr. Harrold he never called for it.

Q. I think they have put in this letter about the non-waiver agreement, so-called. Did the company ever name any arbitrator?

Mr. Edmonds: The defendants and each of them object to that question as wholly immaterial.

Mr. Monnett: They must do something more than to state that they are going to have an arbitrator.

The Court: May it be conceded here, then, that neither party has taken any action toward an arbitrator?

Mr. Monnett: Yes, they have tendered nobody, sent no name, and went no further.

The Court: Do you agree to that?

Mr. Edmonds: That is the fact, but we maintain it is an immaterial fact insofar as our not demanding an appraisal is concerned.

The Court: You claim it was up to the other side to start the proceeding and get it in motion?

Mr. Edmonds: Yes. The Supreme Court has so held, and I would be glad to submit the authorities on it.

Mr. Edmonds: That was after we had complied with their request and during the time that we were complying with their request.

And also:

J. M. Bracken

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is J. M. Bracken; I live in Cumberland, Ohio. I am from Cumberland, Guernsey County, Ohio. I am acquainted with J. M. Scott and knew him during

J. M. Bracken.

year 1926. At that time I was cashier of the Cumberland Savings Bank. At the same time I was fire insurance agent. Those are my signatures at the bottom of Exhibits 1, 4 and 5. I issued those to Mr. Scott.

Q. Do you recall of Mr. Scott giving a chattel mortgage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage?

Mr. Edmonds: He asks, do you recall of Mr. Scott giving a chattel mortgage and we object; first, upon the ground that the evidence disclosed a dual agency here which, in no event, would impute knowledge to this company. Second, evidence tending to show knowledge to the agent is a violation of the parole evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exception by each of the defendants.

(Narrative continued.) At that time I attached the loss payable clause to those policies as agent for the company. I was not down at the fire that occurred there on September 6th; I was not at home. I was down there probably a week or ten days after. It was totally destroyed. I had been in the barn several times to see Mr. Scott on business. I have not the least idea of the amount of wool there.

Q. One or two stories of it?

The Court: Oh, yes; that is established, two stories to that building and a basement.

Mr. Monnett: Containing wool.

The Court: There were two stories that contained wool. It was piled up in the upper story and was stacked up in the lower story.

(Narrative continued.) I recall seeing Mr. Harrod at the bank about the 15th day of September. Mr. Stottsberry, the agent for an insurance company, and myself were with him. Mr. Scott was there, he came in afterwards. I think Mr. Harrod and Mr. Scott went out together, to my remembrance. I think they left together. I do not know whether they went over the losses together. These premiums on these policies were paid to me.

Mr. Edmonds: Which policies? He did not issue two of them.

L. A. Claypool.

Mr. Murphy: 1, 4 and 5 are under consideration and the money was sent to the company by you?

The Witness: Yes.

No cross examination.

And also:

L. A. Claypoole

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is L. A. Claypoole. I live in Cumberland, Ohio. I have lived there a little over eight years. I was living there during the year 1926 at or about the time Mat Scott's wool house burned. I am cashier of the Cumberland Savings Bank, the same bank that Mr. Bracken was in. I talked to Mr. Scott in the morning just after the fire.

Q. What, then, if anything, did you do in pursuance of that by way of communicating with the companies?

Mr. Edmonds: We object. What has this man got to do with the companies?

The Court: Nothing with the companies except that he may have transmitted a message on behalf of Mr. Scott to them. I do not know.

Mr. Monnett: They gave notice to the companies of the loss.

The Court: Who did?

Mr. Monnett: The bank.

The Court: For Mr. Scott?

Mr. Monnett: It does not make any difference who for. They gave notice of this fire. If they gave it I am entitled to that proof and they acted on it.

The Court: Notice that this witness would have sent to the insurance company at the request of Mr. Scott would be competent.

Mr. Edmonds: I did not understand the purpose of it.

Mr. Monnett: The purpose of it is to show that notice was sent in to the company.

The Court: He may testify.

The Witness: May I speak now.

The Court: Yes, it is your turn.

The Witness: Mr. Bracken, at the time of the fire was on a vacation in Cincinnati and Mr. Bracken and I had been connected in business for about eight years and he usually entrusts a large part of the business to me in his absence and I notified the companies because Mr. Bracken was the agent of those companies and I did it for Mr. Bracken.

Foster Scott.

(Narrative continued.) The notice I gave was telegrams, notifying them of the fire of Mat Scott's wool house. I remember Mr. Harrod coming into the bank, I can't say as to the date. It was shortly after the fire. Mr. Scott, the plaintiff, was in there with him.

The Court: What is the mystery of this meeting at the bank at that time?

Mr. Murphy: I don't know that there is any mystery. We want to show that Mr. Harrod and Mr. Scott were there corroborating Mr. Scott's statement.

The Court: There is not any question about that.

Mr. Edmonds: Scott signed the agreement on that date, the non-waiver.

The Court: I think you have got that established.

No cross examination.

And also:

Foster Scott

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is Foster Scott. I am the son of J. M. Scott, the plaintiff in this case. I live near the Village of Cumberland. I was living there in September, 1926. I know about the condition of my father's wool barn about the 6th of September, 1926, or immediately prior thereto. I have seen it a great number of times. It was pretty well filled, not to capacity. I have seen it enough that I could give an estimate of the number of pounds of wool there was in there. I believe there was at least seventy-five thousand pounds of wool in the barn. I know a considerable number of the persons from whom my father obtained this wool, not all of them. I am not at all interested in that wool. I sold him some wool myself, fifty-two hundred pounds, I think, in round numbers. That was in 1926. I sold him in 1925 about three hundred pounds less than in 1926. There was an electrical storm at Cumberland, Ohio, on or about three-thirty to four o'clock A. M. September 6th, 1926. I did not see my father's barn burn when the fire was at its height. I seen it a few hours later. The fire was visible, almost visible from the country, from the farm where I lived. The last name on the paper called plaintiff's Exhibit No. 9 is my signature. I sold forty-four hundred and ten pounds of wool. That was in 1925.

Cross Examination.

By Mr. Edmonds:

I did not assist my father in securing any lists of

Victor Scott.

wool growers that had sold my father wool. I am
The Court: That is, he is not the only son, is that
you mean?
There are other sons. Victor Scott did that.
And also:

Victor Scott

called on behalf of the plaintiff, being first duly
testified as follows:
Examined by Mr. Monnett:
My name is Mr. Scott. I am the son of the pla
J. M. Scott. At the time of the fire in September,
I was living at Cumberland, Ohio. I had lived the
my life. I have been working with dad ever
was eight years old. In 1925 and 1926 I helped
wool in that warehouse.
Q. I will ask you if you were asked by anyone o
father to gather any names on or about November
1926, of people who had put wool in the barn pri
the fire that was sold to your father, were you ask
do that?
Mr. Edmonds: To which each of the defendants
jects.
The Court: We are only interested in the fact
he do so.
Q. Did you do that? A. Yes, sir.
Mr. Edmonds: To which each of the defendants
ject on the ground that the non-waiver agreement
The Court: The objection is overruled. We hav
issue that the losses were not commensurate with
claim made by the plaintiff, as I understand. It
cumbent upon the plaintiff to show what the losses
Mr. Edmonds: We have to save our objection on
other point so far as it is pertinent to the other.
Q. I hand you some papers marked Ehibits 9
and will you state to the Court and jury whether
had any knowledge of the collection of those names
the data thereon.
Mr. Edmonds: Same objection.
The Court: Same ruling.
Exception by each of the defendants.
The Witness: This paper here I know.
(Narrative continued.) That paper is No. 9.
paper, I practically went out for my father and
signed about every name that is on there. I rode
rain and there is the rain blot on there as I
through the country. These other exhibits I got
er two on that. I did not get Exhibit 11. I did

those two on Exhibit 13. I got practically all the names on that one,—that is 10. I didn't get any on 12. I guess I didn't get a name on that one, 8. I know those people personally that signed lists of the names 9, 10 and 11. It would be my judgment that was the amount of wool, substantially, that was delivered to the warehouse by those people. I bought some of it for my father. The amount I bought is represented on there by those names, and the amount on there is the correct amount I bought of those names, and that went into the warehouse that was burned. There were one hundred and forty-four sacks of wool on the lower floor, the first floor. Half of the third floor was filled with loose unwashed wool. I have been weighing, packing and hauling wool ever since I was nine years old. At the time of the fire there was seventy-five thousand pounds of wool in the first and second story. The market value of the wool on or about the 6th of September, 1926, at Cumberland was forty-one cents.

I was not present when Mr. Harrod was there. I was not present when Mr. Bracken or Mr. Stottsberry were there after the fire. I live in town. I did not have any connection with the wool. Father got me to help him the other day to make measurements of the barn. I was not there the day Mr. Harrod measured it.

No cross examination.

And also:

J. W. Spiker

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is J. W. Spiker. I live in Ava, Noble County, Ohio, probably four miles from the village of Cumberland, Ohio. I know J. M. Scott, the plaintiff in this action. I have had occasion to go to J. M. Scott's wool barn in the village of Cumberland, Ohio. I was there on Saturday before the fire. I was in the first and second story of the barn. I saw quite a bit of wool laying there on the first floor. I went from the first floor to the second. There I saw quite a bit more wool, loose wool. Hackney was the man I went there to see, he was selling the wool to Scott. The fire took place the next Monday morning, if I remember right.

No cross examination.

J. W. Cobert. Lee G

And also:

J. W. Cobert

called on behalf of the plaintiff, being first duly sw testified as follows:

Examined by Mr. Joyce:

My name is J. W. Cobert. I live in Cumberland, O I have lived there thirty years. I personally know J. Scott. I recall an occasion when he had a fire of w is known as his wool barn in the village of Cumberl I was at that fire. I was at that fire awhile aft commenced to burn, about four o'clock in the mor and somewheres near there. When I first went the saw this barn of Mr. Scott's burning. When I first I didn't see anything but as the fire burned on I wool falling, burning. It was loose wool falling fr this second floor. I stayed at the fire an hour or mo I suppose. During that time this wool was falling all the time I was there. I seen wool falling, burnin it fell. I had not been at that barn prior to that I had not been about the barn a week or two weeks fore the fire. When I was at this fire I saw Mr. J. Scott, the plaintiff, around there.

No cross examination.

And also:

Lee Glass

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is Glass. I live in Cumberland, Ohio. I have lived there around thirty years. I know J. Scott, the plaintiff in this action. Yes, I remember the morning that he had a fire in his barn. Had quite an electrical storm the morning of that fire. That night or morning I was in bed. It was pretty severe, pretty severe shock on me. It aroused me. I live in the neighborhood of a thousand or twelve hundred feet, I think, from what is called the J. M. Scott wool barn that was burned up. After I was aroused I got up and went out on the porch and I went along the side porch to look in the direction of the report of the thunder and lightning, where I got the location, it was right about in the middle of where the fire was. I went to bed and it was probably a half an hour, maybe more, before I saw a fire. His barn was all in flames when we got there. I could see wool burning there for several days. I would say it was three or four days after I saw this fire that I saw wool burning.

No cross examination.

W. P. Smith. J. D. Collins.

And also:

W. P. Smith

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is W. P. Smith. I live in Reinersville, about twelve miles south of Cumberland. I am a farmer and a wool buyer. Sometimes I am a wool seller. I have been a wool buyer for thirty-three years. I bought wool in the vicinity of Reinersville, Morgan County and Noble County and also Washington County. I think the character of wool in the neighborhood where I have been buying wool compares very favorably with that in and about Cumberland. The reasonable worth of unwashed Delaine wool on the market in the vicinity of Trumbull County and Guernsey County, Ohio, on September 6th, 1926, was about forty-two cents. I did not buy any wool for Mr. Scott in 1926. I bought the wool for Scott in 1925. That is my name on Plaintiff's Exhibit No. 9; that handwriting is mine. That particular time I sold Mr. Scott 12,531 pounds. This wool was hauled from my place about October, 1925, to Cumberland for Mr. Scott. I remember of hearing of this fire of J. M. Scott's barn. I was never there.

Cross Examination.

By Mr. Edmonds:

I bought this wool in 1925 on Mr. Scott's account; I bought it for Mr. Scott. I paid fifty cents for it for him. The price of wool generally was much higher in 1925 than it was in 1926; that is a fact. It was going down considerably in 1926 over what it was in 1925, about eight cents on the pound, from eight to ten cents owing to the quality. That would be true of September 6th, 1926.

And also:

J. D. Collins

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Monnett:

My name is J. D. Collins. J. D. Collins and Son signature on Defendant's Exhibit 8, is mine. I know J. M. Scott, the plaintiff in this case. I have known him about twenty years. I sold him 1780 pounds of wool in August, 1925. That went to his warehouse on a back street, back of the garage. I was in the warehouse in 1926. I was in the warehouse three or four days before the 19th of August. I was in the building a good many

times, I could not just tell the size. I know it had two stories. I was in the second story about a week before the fire, three or four days before the 19th of August. I observed a big pile of wools on the second floor and the lower floor full of sacks of wool. I did not pay any attention what the wool sacks ran per pound. I do not know just what wool and wool in sacks in Cumberland on or about September 6th, 1926, was selling at, but I know what I got for mine in August. In August, 1926, I got forty-one cents. I saw the fire after it fell in. I could not say how soon after the fire that I saw the building. I live two miles out in the country. When I got the word we went down the road and it was pretty bad, the building all fell in. I did not hear any thunder that night. I live two miles from Cumberland. It looked to me like wool burning, like wool when it went down. A pile of stuff there.

And thereupon the plaintiff rested.

Mr. Edmonds: At the conclusion of all of the evidence offered by the Plaintiff, the Defendants, The Home Insurance Company, the Norwich Union Fire Insurance Company, the New York Underwriters Insurance Company, the Sun Insurance Office and the Westchester Insurance Company, separately and severally move the Court to strike from the record and exclude from the consideration of the jury the evidence offered by the Plaintiff tending to show knowledge on the part of Bracken of the existence of the chattel mortgage.

Also evidence tending to show knowledge of Stottsberry of the existence of the chattel mortgage.

Also to strike from the record and exclude from the consideration of the jury the evidence offered of the alleged statement by Harrod to the plaintiff requesting him to secure a list of names of owners or sellers of wool and testimony as to statements claimed to have been made by Harrod to the plaintiff as to the effect of such statements if obtained.

These motions are made severally and separately upon the ground, first, that the evidence offered as to the knowledge of Bracken and Stottsberry, the soliciting agents, violates the parol evidence rule. Second, that it disregards the limitation of authority of agents contained in the policies limiting the authority of agents to change or alter the contract of insurance except by written endorsement thereon, and finally upon the ground that, as to Bracken the evidence shows that he was at the same time local soliciting agent for three of the companies in suit, defendants in these suits and was at the same time cashier or assistant cashier——

The Court: Do you mean that incapacitates him because he was an officer of the bank from being an agent of the insurance company?

Mr. Edmonds: It is an additional reason why his knowledge would not be imputed to the company and would not bind the company.

The Court: You claim then that if his knowledge otherwise could be imputed to the company that because he was an officer of the bank it could not be imputed?

Mr. Edmonds: Yes, that is the point.

The Court: I might say with a good deal of confidence at this time that I do not think there is anything in that theory. The big question that you are saying is, whether or not, notice to him was notice to the company That is your point and that is an open question.

Mr. Edmonds: I would like an opportunity to submit the authorities. The question also is raised on the motion for a directed verdict which I wish to make at this point. I did not know whether the Court wished to pass on the exclusion of the evidence at this time.

The Court The motion is made and is subject to a ruling. Have you any other motion?

Mr. Edmonds Yes. Now come the defendants, The Home Insurance Company, the Norwich Union Fire Insurance Society, The New York Underwriters Insurance Company, the Sun Insurace Company Lmtd., the Westchester Fire Insurance Company, and at the conclusion of all the evidence offered by the plaintiff and separately and severally move the Court to direct the jury to return a verdict in favor of the several defendant Insurance Companies in each of the cases here involved, severally and separately, upon the grounds:

1. As to the suits against the Home Insurance Company, The Norwich Union Fire Insurance Society, Ltd., and Sun Insurance Office, as defendants:

There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. As to all five of the suits in trial.

The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as

a condition precedent by the policies and there ... evidence of waiver or estoppel to assert this defe...

And thereupon the further hearing of this ca... adjourned until Thursday morning, June 14, 19... nine thirty o'clock A. M.

Thursday Morning Session.

June 14th, 1928.

Mr. Monnett: The plaintiff makes a motion th... Court submit the question to the jury on the evi... and instruct the jury to return a verdict for the ... tiff on the same grounds heretofore named, to-wit ... they did not tender back before the suit or any ... time the amounts paid for the respective premiu...

The Court: That motion is overruled and exceptio... noted.

Let the record show that the plaintiff's case is op... for the purpose of receiving additional proof in ... to complete the record, and that is the document ... is marked Exhibit No. 24.

And Be It Further Remembered, That the plai... to further maintain the issues on his part to be ma... tained introduced and offered in testimony the follo... ing evidence, to-wit:

Mr. Monnett: We desire to tender in evidence th... document which is marked Exhibit No. 24.

The Court: Are there any remarks?

Mr. Edmonds: No.

The Court: It is admitted.

And thereupon the document above offered was ad... mitted in evidence on behalf of the plaintiff and is he... with submitted marked Plaintiff's Exhibit No. 24 an... made a part hereof.

And thereupon the plaintiff rested.

And thereupon the defendants and each of the... severally renewed their motion as heretofore set out ... the time the plaintiff first rested, for directed verdicts ... favor of the several separate defendants upon the fo... lowing grounds:

1. As to the suits against The Home Insurance Co... pany, The Norwich Union Fire Insurance Society an... the Sun Insurance office, as defendants:

There is a non-joinder of necessary parties and the... suits are not brought in the name of the real parties ... interest because of absence of the bank which is pay...

2. As to all five of the suits in trial:

The evidence and pleadings establish without dis... incumbrance by chattel mortgage without consent th... to endorsed on the policies and there is no evidence ... facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

The Court: The matter submitted to the Court at this time is upon the motions of the defendants, severally, to direct a verdict for the various reasons appearing in the motion made on the record. The chief and primary question raised by that motion is as to the effect of a condition which is common to all five of the policies, having to do with the necessity for the reformation of the policies because of a loan on the subject matter of the personal property made in the nature of a chattel mortgage. The principal part of the discussion is that point that is raised in the motion.

In the arguments there have been cited a great number of cases both in the State of Ohio and from the United States Courts, and from the Court of Appeals, particularly, of the Sixth District in which we are primarily interested.

The rule in Ohio is announced and settled by the decision in the 101st Ohio State, which is distinguished from the case in the 82d Ohio State. The subject of the property insured in that case is real estate and the question arose because there was a defective title to the real estate. The Court held, in general terms, that the Statute 9586 of the General Code, referred to the authority of insurance agents, and knowledge by the agent, brought knowledge to the insurance company in that case and the insurance company was bound. That, of course, was later followed and very recently followed by the case reported in the October Monthly Law Bulletin known as the Glass case and the subject matter in that case referred to a mortgage on chattel property, personal property. So that there can be no question about the rule in Ohio.

Now the rule in Federal Courts is and has been from time immemorial, as well as elsewhere, that parole evidence is not admissible to vary the terms of a written contract. Upon that principle of law I think it may be stated that the decision of the Sixth Circuit Court of Appeals was made in the Hartford Insurace Company against Nance and Jones. As I have heretofore remarked, those holdings, and that decision, seem to be at odds with the rule laid down by the Court of last

resort in Ohio, and that is because those two cases d
tinguished between questions arising in connection w
the validity of the contract itself and questions aris
which have to do with the rule of property which is t
subject matter of the particular insurance. The Co
of Appeals put that in a category which must be dec
under the statutes of the given state and decisions
the court of last resort of that state and they furth
distinguish the cases beore them as applying to t
other class which has to do and is related to the gene
law of jurisprudence, and questions of that nature mu
follow the United States Federal decisions. To fort
their position and decision in that respect they hav
cited some several decisions of the United States Su
preme Court.

So that, taking the Federal decisions of this Circu
and analyzing them in the light and along with the d
cisions of the Ohio State Supreme Court upon the sam
subject, the distinguishing features which I have men
tioned are very apparent and are very plain and clear
drawn so that we may say from a Federal standpoi
that the law having to do with the validity of the insu
ance contract is referable to the State law, and the la
having to do with the rule of property governing th
subject matter of insurance is also referable to Sta
law and that other questions that bring themselves fort
under the category of the general law of jurisprudenc
are referable to the holdings of the United States Court
both Supreme and subordinate.

We have before us proof that has been admitted, an
admitted under objection, some of it admitted upon th
theory that the Court might later find it necessary t
withdraw it from the consideration of the jury if the
were no jury questions. So far as this one question
concerned that relates to the evidence that was offer
and received temporarily in reference to the chattel lo
and the chattel mortgage and what was done by t
insured and by the bank from whom he made his loa
and gave his chattel mortgage and the local insuran
agents in regard thereto; and it developed that in th
of the policies, namely, 1, 4 and 5, the insured inform
the local agents—two local agents involved, one of wh
was an officer of the bank where the insured transact
his business and made his loan. Of course, that partic
lar agent was cognizant of the loan because he m
the loan as an officer of the bank, and what the insu
did was to notify him of the loan and also notify
agent of the companies of the loan that had to do w

policies 2 and 3. Those agents knew necessarily of the loan. There can be no question about that. The only question about it is whether it is proper evidence to be produced from the witness stand under the parole evidence rule. What transpired in reference to a chattel mortgage that was consummated in the execution and delivery of what is now known as Plaintiff's Exhibit 24, is related to a rule of property. It is called in the pleadings a chattel mortgage.

It is a written document. Is it a chattel mortgage? An inspection of the document itself discloses the fact that there is no statement or claim as is made mandatory by the statute of the State of Ohio. A further inspection of the Exhibit itself discloses the fact that there are no file marks on it, that the injunction of the statute that the proper officer endorse the time when it is filed and the date when filed and that it was filed, are altogether wanting on this document. Furthermore, the interpretation of those sections of the statute, General Code of Ohio, by the Supreme Court of the State of Ohio is to the effect that a chattel mortgage, or a document of that kind does not rise to the dignity of a chattel mortgage for the reason that it cannot operate against creditors and it simply remains a contract between the parties to it without, in any way, affecting the rights of other parties. If it is a contract between the so-called and named mortgagor and the so-called and named mortgagee in the document itself by which an undertaking is made by the mortgagee to furnish so much money, and an undertaking is made by the so-called mortgagor to grant a lien upon certain personal property, that will be good in the hands of the parties themselves as against the rights of all creditors, general and special, it becomes merely a collateral contract the same as the giving of a promissory note, and had to do with the rule of property, and it is governed by the law of the State of Ohio and the decisions of the State Courts.

Furthermore, by giving notice of the loan that was to be made shows on the part of the insured the lack of any attempt to commit any fraud upon the insurance company and no doubt the transaction was handled between the insured and the insurance agents as a chattel mortgage and no doubt what the insurance agents did on behalf of the insured was to protect these insurance policies because of that loan. There is no question about that. So that the evidence that has been introduced relative to the wording contained in the riders upon

those three insurance policies and the facts that
offered surrounding that transaction is not parol
dence to vary the terms of any written contract but
ply parol evidence to interpret the language used
those riders, and the non-effect of this transaction
chattel mortgage must be held to be a rule of prop
governed by state laws, and governed by the laws of
State of Ohio and the decisions of the State of Ohio
because that is so the cases of the Hartford Insura
Company against Jones, and Hartford Insurance Co
pany against Nance are, to the extent I have indicat
non-applicable to the issues that we have before
Court here. The waiver agreement, or the non-waiv
agreement as to the terms according to the construct
that I have been able to put upon it is simply a st
cock. It is a paper which the adjuster sought and
ceived the signature of the insured to hold matters
status quo until an examination could be made of th
enormity and quantity of the loss, and there is not
agreement here between the parties about which to
agree. The evidence on that subject in general terms
something like this: The adjuster came, sought an
terview with the insured, accused him in broad terms
burning down the property and told him what he wo
have to do before they would have the material on wh
to base proof of loss. To that the assured acceded
immediately started to work to get the information
gether. Later, and within sixty days, as provided
the policies, proof of loss was forwarded to the ins
ance companies. After some little time, after the co
pany had digested, presumably, or made an examin
tion of those proofs of loss it sent word to the insu
that the parties are under disagreement about
claim for loss. That is all that was done. There wa
negotiation about it. There was not any confere
about it. They set off in their respective offices out th
respective head offices in the east, and sent word ba
this insured that the parties disagreed, and, therefo
is claimed here at this time in the orderly trial of this
suit that the insured is deprived of his remedy and w
he should have done was to have erected and constru
a board of arbitration and secured the decision
board of arbitration on the value of all of this prop
It does not appear whether that should be with the
sent or the non-consent of the insurance companies.
do not know. But that is what is claimed, that he s
have done that before bringing suit. That was in
bent upon him and necessary for him to do as a st

Mr. I. Edwin Stottsberry.

development precedent to bringing suit. My own notion is that an insurance company cannot sit off in an isolated manner of that sort and allow matters to drift to an unreasonable time and thus claim in a Court of Law that the Court has not any jurisdiction over the suit because the insured did not do thus and so. I do not think the failure to offer to tender back insurance premiums would have anything to do with the issue before this Court at this time unless it be as a very slight element related to the question of estoppel. There is not very much in this record on the question of the non-tender of insurance premiums. Whatever there is in the record will remain in and cannot be prejudicial to the interest of either or any party. The conclusion is, that the motion to direct a verdict may be overruled and the motion to withdraw testimony offered which was objected to at the time by the defendants and admitted over the objection of the defendants, that motion may be also overruled and each of the defendants may have exceptions to the rulings of the Court on each of the motions. You may call the jury.

Mr. Edmonds: To all of which rulings each of the defendants severally except.

Mr. Edmonds: May I just say one word, Your Honor, as to the chattel mortgage proposition that the law of Ohio would govern. We have not had an opportunity to present to Your Honor the law of Ohio as to the effect of that chattel mortgage so signed is a defense and we would like to do so, if Your Honor would care to hear from us.

The Court: No.

Be It Remembered, That the defendants, to maintain the issues on their parts to be maintained, introduced and offered in testimony on their behalf the following evidence, to-wit:

Mr. I. Edwin Stottsberry

called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. Edmonds:

My name is I. Edwin Stottsberry, and I live at Zanesville now, formerly lived at Cumberland; and was a local agent in 1926 at Cumberland for the New York Underwriters Insurance Company and the Westchester Fire Insurance Company, and as such agent countersigned the two policies, Plaintiff's Exhibits 3 and 2. The policies covered on the 6th of September, 1926, to the property described in these policies.

"Q. State whether or not until after that fire o... you ever had any knowledge that any of the ... scribed in these policies was encumbered by ... mortgage?

Mr. Monnett: Wait. I thought that was out ... issue. There is no chattel mortgage.

The Court: Let him answer the question. Of ... it is out of the issue.

"A. It was not clear in my mind that way. I did ... understand that there was a mortgage on it.

Mr. Monnett: Inasmuch as they have not shown ... chattel mortgage we object to it at this time.

The Court: Objection overruled and exception noted."

No cross examination.

Mr. Edmonds: Each of the defendant insurance companies rest.

And thereupon each of the defendant insurance companies rested.

Mr. Edmonds: At the conclusion of all of the evidence——

The Court: You wish to reiterate your motion?

Mr. Edmonds: There is no rebuttal?

Mr. Monnett: He did not claim there was a mortgage he just said he didn't know there was any.

Mr. Edmonds: Now come each of the defendant insurance companies, The Home Insurance Company, The Norwich Union Fire Insurance Society, The New York Underwriters Insurance Company, the Sun Insurance Office, The Westchester Fire Insurance Company and each severally move the Court to direct the jury to return a verdict in favor of each several defendant insurance company on the following ground:

1. That the evidence, without dispute, and the pleadings and admissions therein establish violation of the condition prohibiting the chattel mortgage contained in the policies and that no evidence of facts constituting waiver or estoppel to assert this defense has been offered.

2. Upon the ground that the evidence, without dispute, establishes that subsequent to the fire in question the plaintiff and each of the defendant insurance companies severally disagreed as to the amount of loss caused by the fire in question to the property described in each of the several insurance contracts, and that the amount of the loss has never been ascertained by appraisal and that there is no evidence in the case of

constituting waiver or estoppel against the insurance companies or any of them to assert this defense.

3. Upon the ground that the evidence, without dispute, establishes that three of the insurance contracts in suit, namely, the policy of the Home Insurance Company, the policy of The Norwich Insurance Society and the policy of The Sun Insurance Office contain loss payable clauses making the laws, if any, in case of fire, payable not only to the plaintiff but also to the Cumberland Savings Bank and Trust Company and there is a non-joinder of necessary parties plaintiff in these actions and the same are not brought by the real party in interest.

The Court: That motion, as made, may be overruled, and the defendants, respectively, have their exceptions to the ruling of the Court.

Mr. Edmonds: To all of which rulings each defendant severally excepts.

Mr. Monnett: We ask the Court to instruct the jury to bring in a verdict for the plaintiff for the full amount with interest from the date of the fire against each of the insurance companies, full amount of the policy with interest from the 6th day of September, 1926, as the evidence now stands.

The Court: The motion of the plaintiff may be sustained with modification and limitation.

The jury may be instructed to return a verdict upon policies 1, 4 and 5 and the motion as it applies to policies 2 and 3 may be held in suspension until the court submits to the jury the request for a special verdict upon the question of notice to the agent of the respective insurance companies holding policies 2 and 3.

Gentlemen of the Jury, the view taken by the Court upon a number of questions——

Mr. Edmonds: I would like to except to the Court's ruling in sustaining the motion for the reasons:

1. There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee as to the cases based on policies payable to the bank, i. e. the cases against the Home Insurance Company, the Norwich Union Fire Insurance Society, Ltd., and the Sun Insurance Office.

2. In all the cases: The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and [illegible] no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases: The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss, and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

Mr. Edmonds: I understand the Court announced that he would sustain the motion so far as policies 1, 4 and 5 are concerned.

The Court: You may have your exceptions right now or later.

Exceptions noted.

As I started to say, the questions submitted to the Court at the close of the plaintiff evidence were such that a great many, or practically all the questions that arise, according to the Court's view of the issues in the five cases that we are trying, are issues addressed to the Court and not to the jury. In other words, they are issues of law other than issues of fact and that is the reason for the sustaining of the motion in reference to three out of the five cases which are before the Court. And, as I said, I desire to submit to the jury a request for a special verdict upon the question as to whether or not the local agent of the insurance companies, under policies numbered 2 and 3, and which are the policies of The New York Underwriters Company and of The Westchester Fire Insurance Company, of whom the last witness that was on the witness stand was the local agent and secured policies from the insured, whether or not that agent had notice of this loan. Now, we have before us the evdence of some witnesses who testified upon this subject, that is, the question whether Mr. L. E. Stottsberry, the agent, knew of, and was apprised of the fact that it was contemplated to take a chattel mortgage on this wool; that is, the local bank to take a chattel mortgage upon the wool from the owner of the wool, the plaintiff in the case, Mr. Scott. The agent himself has been on the stand for the defendants and his testimony for the defendant is all the testimony and all the facts which you have from the standpoint of those two defendants, and he testified that he did not understand it that way, or you will remember what he said in that regard. The question for you to determine, and the only question for you to determine, is whether the agent, the local agent, Mr. Stottsberry, had notice of the contemplation of taking a loan upon this wool by a regular chattel mortgage and that the loan was made.

In solving this problem you will cast the burden

proof upon the plaintiff and the plaintiff must satisfy you by a preponderance of the evidence, that is, the greater weight of the evidence, not necessarily the greater number of witnesses, but the greater weight of the evidence, and you are the sole judges of the weight which you will give to the evidence of any witness and all the witnesses.

The credibility of witnesses is a matter for your sole solution. You may believe all a witness has said or nothing he has said or a part of what he has said and disregard the remainder of what he has said, as unworthy of belief. That is what credibility means. Just worthiness of belief.

I think you understand that the only issue that is put up to you is that of a special verdict to ascertain that fact. You may retire.

The clerk will furnish you with the blanks in order for you to perform your duty. That means that I have just put up to you that one question. As soon as you have solved it you may report it back into Court. You may retire.

Mr. Edmonds: The defendants except to the statement of the Court that there were witnesses who testified that Stottsberry knew it was contemplated to take a loan.

The Court: You except because that is plural instead of singular?

Mr. Edmonds: Yes.

The Court: Gentlemen of the jury, objection has been made to the statement of the Court to you in the instruction where I used the language that witnesses had testified in reference to the notice of the agent Stottsberry. That objection is, I am told, because I made it plural. It is plural or singular, depending upon what you find about it.

Mr. Edmonds: And the defendants in the presence of the jury each except to the Court's charge to the jury that knowledge of the agent would be material, either of a chattel mortgage theretofor obtained, or of a chattel mortgage proposed to be obtained in the future, to that each of the defendants except for the reason that the evidence upon that point is immaterial and constitutes a violation of the parol evidence rule and disregards the limitation of the agent's authority contained in the insurance contracts.

And the defendants object and except to the admission of the special verdict to the jury on that issue.

The Court: Exceptions may be noted and you may retire, gentlemen.

And thereupon the jury retired and afterwards brought in a verdict against the two companies.

The Court: The special verdict of the jury having been returned the motion of plaintiff insofar as it applies to the two defendants, The New York Underwriters and The Westchester Fire Insurance Company, being undisposed of, it is the conclusion of the Court that the principal sum of each of those policies are recoverable by the plaintiff and verdicts may follow accordingly, and thus the motion, as originally made, is now sustained as to each defendant and the jury instructed to return the verdicts.

Mr. Edmonds: To which each of the insurance companies except on the same grounds as heretofore stated in the motions made for directed verdicts in favor of the respective insurance companies and also upon the ground that the Court is without jurisdiction to determine the amount due but that the matter should be submitted to the jury to determine the extent of the loss and the amount due, if any, under each defendant's respective policy.

Mr. Monnett: Interest is computed from the date of the fire, the day that the loss occurred.

Mr. Bibbee: No.

The Court: That is right? That is what you sue for, is it?

Mr. Edmonds: You did not put that in the form of an instruction.

The Court: That would necessarily follow.

Mr. Edmonds: Our position is that the policy provides that it is not payable until sixty days after proof of loss or award of appraisals therefor and until payable it could not draw interest.

Mr. Monnett: We consent to put in remitturs, if that computation is wrong.

Mr. Edmonds: Each of the defendants except to the order of the Court in directing verdicts for the full amount of each policy with interest from the date of the fire for the additional reason, in addition to the reasons heretofore stated, that the policies provide that they are not payable until sixty days after proofs of loss are furnished or until sixty days after the award has been rendered when required and that interest upon any amount due under the several policies would not therefore, begin to run until sixty days after proofs of loss were rendered or until sixty days after the award

had been rendered where an appraisal has been required as in these cases.

Now comes each of the defendants and severally except to the action of the Court in directing the jury to return verdicts in each of these cases in favor of the plaintiff for the same reasons stated in support of the motions for directed verdicts made on behalf of each defendant, namely:

1. In the cases in which The Home Insurance Company, The Norwich Union Fire Insurance Society Ltd., and the Sun Insurance Office are defendants, there is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. In all of the cases the evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases the evidence and pleadings without dispute establish a disagreement between the plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

4. That the court had no jurisdiction to determine the amount due.

5. That the amount for which the court instructed the jury to return verdicts in each case is excessive.

The jury then retired and thereafter returned into court with its separate verdicts in favor of the plaintiff and against the several defendants in accordance with the direction and instructions of the Court as appears from the record herein.

Thereafter, within three days after the rendition of said verdicts defendants each filed their separate written motion for new trial and to set aside the separate verdicts against them for the reasons and upon the grounds set fort has appears of record herein, all of which motions the court on consideration, thereafter overruled, and did render separate judgments on said separate verdicts against the several defendants and in favor of the plaintiff as appears of record herein, to all which actions and rulings of the court the several defendants, at the time severally excepted.

And now, in furtherance of justice, and that right may be done, the defendants present the foregoing as their

Narrative Form Bill of Exceptions taken in the tri... the above causes, a true and correct copy of the evid... verbatim and of this Narrative Form Bill of Ex... tions each having been heretofore lodged herein w... the Clerk of this Court, which they pray the Court ... be allowed signed and sealed and ordered to be ... a part of the record in these causes. And it appear... to the Court that the defendants have given to the pl... tiff due notice of such lodgment, and no objections h... ing been filed thereto by the plaintiff, the Court ... that the said narrative statement of evidence and ... exhibits attached hereto and made a part hereof is ... of the evidence offered or received on the trial of t... above entitled causes and is correct in all respects, ... is properly prepared, does therefore approve, settle ... allow the same; and said statement having now be... approved by this Court it is hereby ordered that t... foregoing Narrative Form Bill of Exceptions be filed ... the office of this Court and become part of the reco... herein and settled and allowed, signed and certified ... the Judge as provided by law, all of which is accor... ingly done on this twenty-second day of September, 19...

In testimony whereof, the undersigned, the judge ... this Court who presided at the trial of said causes h... hereunto set his hand this 22 day of September, 1928.

Approved:

Benson W. Hough,
Judge of the United State... District Court for the South... ern District of Ohio, Eastern Division.

Approved:

James Joyce,
F. S. Monnett and
Elwood Murphy,
Counsel for Plaintiff.

.....,
Counsel for each Defendant.

PLAINTIFF'S EXHIBIT No. 1.

No. 173

Stock Company
The Home Insurance Company
New York
Organized 1853.

Amount $8000. Rate $1.27. Premium $101.60.

In Consideration of the Stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the sixth day of July 1926, at noon, to the sixth day of July, 1927, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio

Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said

struction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the

going stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents: but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do;

but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fire works, gasoline, greek fire, gunpowder exceeding twenty five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quan-

ties not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured, or by the company by giving five days'

notice of such cancellation. If this policy shall be ... celed as hereinbefore provided, or become void or ... the premium having been actually paid, the unea... portion shall be returned on surrender of this poli... last renewal, this company retaining the customary ... rate; except that when this policy is canceled by ... company by giving notice it shall retain only the ... rata premium.

If with the consent of this company, an interest ... this policy shall exist in favor of a mortgagee or of ... person or corporation having an interest in the sub... of insurance other than the interest of the insured as ... scribed herein, the conditions hereinbefore contain... shall apply in the manner expressed in such provis... and conditions of insurance relating to such interes... shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered ... fire as to require removal to a place of safety, and is ... removed, that part of this policy in excess of its pro... tion of any loss and of the value of property remain... in the original location, shall, for the ensuing five da... only, cover the property so removed in the new locati... if removed to more than one location, such excess of t... policy shall cover therein for such five days in the pr... portion that the value in any one such new location bea... to the value in all such new locations; but this compan... shall not, in any case of removal, whether to one or m... locations, be liable beyond the proportion that the ... amount hereby insured shall bear to the total insuran... on the whole property at the time of fire, whether the ... same cover in new location or not.

If fire occur the insured shall give immediate notice ... any loss thereby in writing to this company, protect t... property from further damage, forthwith separate t... damaged and undamaged personal property, put it i... the best possible order, make a complete inventory o... the same, stating the quantity and cost of each arti... and the amount claimed thereon; and, within sixty d... after the fire, unless such time is extended in writi... by this company, shall render a statement to this co... pany, signed and sworn to by said insured, stating ... knowledge and belief of the insured as to the time a... origin of the fire; the interest of the insured and of ... others in the property; the cash value of each ite... thereof and the amount of loss thereon; all incumbra... thereon; all other insurance, whether valid or not, c... ing any of said property; and a copy of all the de... tions and schedules in all policies; any changes in

title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for greater proportion of any loss on the described property for loss by and expense of removal from premises

endangered by fire, than the amount hereby insured bears to the whole insurance, whether valid or not, solvent or insolvent insurers, covering such property, the extent of the application of the insurance under policy or of the contribution to be made by this company in case of loss, may be provided for by agreement condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of loss, be subrogated to the extent of such payment to the right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 2.

No. 21023. Stock Company.

New York Underwriters Insurance Company.

Amount $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage, by fire, [illegible] as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Exhibits.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated West side of Cambridge St., Book No. 50 Map No. 117½, City Town of Cumberland, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically provided by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage c... by lightning (meaning thereby the commonly accepte... use of the term lightning, and in no case to include ... or damage by cyclone, tornado or windstorm), not ex... ceeding the sum insured, nor the interest of the insur... in the property, and subject in all other respects to t... terms and conditions of this policy. Provided, howeve... if there shall be any other insurance on said proper... this company shall be liable only pro rata with suc... other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightnin... or not.

Attached to and forming part of Policy No. 21023 ... the New York Underwriters Insurance Company of New York City

City.

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy. This policy is in a stock corporation.

In Witness Whereof, this Company has executed ... attested these presents; but this policy shall not be va... until countersigned by the duly authorized Agent of ... Company at Cumberland, Ohio—786.

A. R. Stoddart, Secretary. R. M. Bissell, Presid...

Exhibits.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole own
or if the subject of insurance be a building on g
not owned by the insured in fee simple; or if the s
of insurance be personal property and be or becom
cumbered by a chattel mortgage; or if, with the k
edge of the insured, foreclosure proceedings be
menced or notice given of sale of any property co
by this policy by virtue of any mortgage or trust dee
if any change, other than by the death of an insured,
place in the interest, title, or possession of the subj
insurance (except change of occupants without inc
of hazard) whether by legal process or judgment o
voluntary act of the insured, or otherwise; or if this
icy be assigned before a loss; or if illuminating g
vapor be generated in the described building (or
cent thereto) for use therein; or if (any usage or cu
of trade or manufacture to the contrary notwithst
ing) there be kept, used, or allowed on the above
scribed premises, benzine, benzole, dynamite, ether,
works, gasoline, Greek fire, gunpowder exceeding tw
five pounds in quantity, naphtha, nitro-glycerine,
other explosives, phosphorus, or petroleum or any o
products of greater inflammability than kerosene o
the United States standard (which last may be used
lights and kept for sale according to law, but in qu
ties not exceeding five barrels, provided it be drawn
lamps filled by daylight or at a distance not less tha
feet from artificial light); or if a building herein
scribed, whether intended for occupancy by owne
tenant, be or become vacant or unoccupied and so re
for ten days.

This company shall not be liable for loss caused
rectly or indirectly by invasion, insurrection, riot,
war or commotion, or military or usurped power,
order of any civil authority; or by theft; or by ne
of the insured to use all reasonable means to save
preserve the property at and after a fire or whe
property is endangered by fire in neighboring pre
or (unless fire ensues, and, in that event, for the d
by fire only) by explosion of any kind, or lightnin
liability for direct damage by lightning may be a
by specific agreement hereon.

If a building or any part thereof fall, except
result of fire, all insurance by this policy on such
ing or its contents shall immediately cease.

This company shall not be liable for loss to a
bills, currency, deeds, evidences of debt, money, n
securities; nor, unless liability is specifically

Exhibits.

[illegible], for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by [illegible] to require removal to a place of safety, and is so [illegible], that part of this policy in excess of its proportion of any loss and of the value of property remaining [illegible] original location, shall, for the ensuing five days [illegible] the property so removed in the new location; [illegible] to more than one location, such excess of this

policy shall cover therein for such five days in th
portion that the value in any one such new location
to the value in all such new locations; but this co
shall not, in any case of removal, whether to one o
locations, be liable beyond the proportion tha
amount hereby insured shall bear to the total ins
on the whole property at the time of fire, whethe
same cover in new location or not.

If fire occur the insured shall give immediate not
any loss thereby in writing to this company, prote
property from further damage, forthwith separat
damaged and undamaged personal property, put
the best possible order, make a complete inventor
the same, stating the quantity and cost of each a
and the amount claimed thereon; and, within sixty
after the fire, unless such time is extended in wr
by this company, shall render a statement to this c
pany, signed and sworn to by said insured, stating
knowledge and belief of the insured as to the time
origin of the fire; the interest of the insured and a
others in the property; the cash value of each
thereof and the amount of loss thereon; all incumbr
thereon; all other insurance, whether valid or not, c
ing any of said property; and a copy of all the de
tions and schedules in all policies; any changes in
title, use, occupation, location, possession, or expo
of said property since the issuing of this policy; by w
and for what purpose any building herein described
the several parts thereof were occupied at the tim
fire; and shall furnish, if required, verified plans
specifications of any building, fixtures, or machinery
stroyed or damaged; and shall also, if required, fu
a certificate of the magistrate or notary public (n
terested in the claim as a creditor or otherwise, n
lated to the insured) living nearest the place o
stating that he has examined the circumstances a
lieves the insured has honestly sustained loss t
amount that such magistrate or notary public
certify.

The insured, as often as required, shall exhibit t
person designated by this company all that rema
any property herein described, and submit to ex
tions under oath by any person named by this co
and subscribe the same; and, as often as required,
produce for examination all books of account, bi
voices, and other vouchers, or certified copies th
originals be lost, at such reasonable place as
designated by this company or its representativ

Exhibits.

permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss or value, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed in writing.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all the right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it is to be held to include the legal representative of the

Exhibits.

insured and wherever the word "loss" occurs, it be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other com having special regulations lawfully applicable to it ganization, membership, policies or contracts of in ance, such regulations shall apply to and form a pa this policy as the same may be written or printed attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 3.

No. 969337. Organized 1

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $7

In Consideration of the Stipulations herein named of Seventy-four & No/100 Dollars Premium Does In J. M. Scott for the term of one year from the first day April 1926 at noon to the first day of April 1927 at n against all direct loss or damage by fire, except as h inafter provided, to an amount not exceeding Five th sand Dollars, to the following described property wh located and contained as described herein, and not e where, to-wit:

Uniform Standard Ohio Form No.
(Edition June

Wool Form

(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided insured is legally liable therefor, this item shall cover such merchandise held in trust, or on commis or sold but not delivered; all only while contained in two story approved roof frame building, occupie wool storage situated west side of Cambridge s Book No. 50 City Town of Cumberland, State of This item shall also cover said merchandise w one hundred (100) feet of the above described bui while on sidewalks, streets, alleys, yards, detached forms and in or on vehicles or railway cars; also o merchandise while on platforms in contact wit above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Po Permission granted for mechanics to be employ

Exhibits.

than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 269337 of the Westchester Fire Insurance Company of New York.

Name of Insurance Company

Issued at its Cumberland, Ohio Agency. Dated April [illegible].

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following

stipulations and conditions printed on back hereof, w
are hereby specially referred to and made a part of
Policy, together with such other provisions, agreem
or conditions as may be endorsed hereon or added h
and no officer, agent or other representative of this C
pany shall have power to waive any provision or cond
of this Policy except such as by the terms of this Po
may be the subject of agreement endorsed hereo
added hereto; and as to such provisions and condit
no officer, agent, or representative shall have such po
or be deemed or held to have waived such provisions
conditions unless such waiver, if any, shall be writ
upon or attached hereto, nor shall any privilege or p
mission affecting the insurance under this Policy e
or be claimed by the insured unless so written or a
tached.

Provisions Required by Law to be Stated in this P
icy.—This policy is in a stock corporation, and is iss
under and in pursuance of Sections 130, 131 and 13
the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed a
attested these presents; but this policy shall not be va
until countersigned by the duly authorized Agent of th
Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, Presid

Countersigned at Cumberland, Ohio, this 1st day
April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actu
cash value of the property at the time any loss or dam
occurs, and the loss or damage shall be ascertained
estimated according to such actual cash value, w
proper deduction for depreciation however caused, a
shall in no event exceed what it would then cost the
sured to repair or replace the same with material of
kind and quality; said ascertainment or estimate sha
made by the insured and this company, or, if they di
then by appraisers, as hereinafter provided; and,
amount of loss or damage having been thus determi
the sum for which this company is liable pursuant to
policy shall be payable sixty days after due notice, a
ascertainment, estimate, and satisfactory proof of the
have been received by this company in accordance
the terms of this policy. It shall be optional, how
with this company to take all or any part of the ar
at such ascertained or appraised value, and also to
pair, rebuild, or replace the property lost or da
with other of like kind and quality within a reas

...on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fire-works, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosive, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of

the United States standard (which last may be use
lights and kept for sale according to law but in qu
ties not exceeding five barrels, provided it be draw
lamps filled by daylight or at a distance not less tha
feet from artificial light); or if a building here
scribed, whether intended for occupancy by own
tenant, be or become vacant or unoccupied and so re
for ten days.

This company shall not be liable for loss caus
rectly or indirectly by invasion, insurrection, riot,
war or commotion, or military or usurped power,
order of any civil authority; or by theft; or by n
of the insured to use all reasonable means to save
preserve the property at and after a fire or whe
property is endangered by fire in neighboring pre
or (unless fire ensues, and, in that event, for the da
by fire only) by explosion of any kind, or lightning
liability for direct damage by lightning may be ass
by specific agreement hereon.

If a building or any part thereof fall, except as
result of fire, all insurance by this policy on such b
ing or its contents shall immediately cease.

This company shall not be liable for loss to acco
bills, currency, deeds, evidences of debt, money, note
securities; nor, unless liability is specifically ass
hereon, for loss to awnings, bullion, casts, curios
drawings, dies, implements, jewels, manuscripts, m
models, patterns, pictures, scientific apparatus, s
store or office furniture or fixtures, sculpture, tool
property held on storage or for repairs; nor, beyond
actual value destroyed by fire, for loss occasioned
ordinance or law regulating construction or repa
buildings, or by interruption of business, manufactu
processes, or otherwise; nor for any greater propo
of the value of plate glass, frescoes, and decorations
that which this policy shall bear to the whole insu
on the building described.

If an application, survey, plan, or description of p
erty be referred to in this policy it shall be a part o
contract and a warranty by the insured.

In any matter relating to this insurance no perso
less duly authorized in writing, shall be deemed
agent of this company.

This policy may by a renewal be continued und
original stipulations, in consideration of premium fo
renewed term, provided that any increase of hazard
be made known to this company at the time of re
or this policy shall be void.

Prohibited.

This policy shall be canceled at any time at the request of the insured, or by this company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or on renewal, this company retaining the customary short rates, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, this condition hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, cover-

ing any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and whether the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy

Exhibits.

a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 4.

No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office
63 Threadneedle St.
London, Eng.

U. S. Branch
54 Pine Street,
New York.

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June

Exhibits.

1927 at noon against all direct loss or damage by
except as hereinafter provided, to an amount not
ceeding Five Thousand Seven Hundred & Fifty Dol
to the following described property while located
contained as described herein, and not elsewhere, to
Uniform Standard Ohio Form No.
(Edition June

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided
insured is legally liable therefor, this item shall
cover such merchandise held in trust, or on commis
or sold but not delivered; all only while contained in
two story slate roof frame building, occupied as
storage situated West side of Cambridge Street risk
50 Map 117½ City Town of Cumberland, Ohio, Sta
Ohio. This item shall also cover said merchandise w
one hundred (100) feet of the above described buil
while on sidewalks; streets, alleys, yards, detached
forms and in or on vehicles or railway cars; also on
merchandise while on platforms in contact with
above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed
more than fifteen (15) days in making alterations,
provements and repairs to any building herein descri
and in constructing additions or sheds which attach
and communicate with such building, and the insura
if any hereunder, on such building is hereby made
cover such alterations, improvements, repairs, attach
and communicating additions and sheds, also build
materials and supplies therefor, while contained the
or on the premises immediately adjacent thereto;
the insurance, if any hereunder, on contents of any bu
ing herein described is hereby made to cover in
attached and communicating additions and sheds to
building; but any change in a fire wall, the removin
replacing of the joists or supports of a floor, or the
struction of additional stories to any building he
described, when mechanics are employed for such
poses for more than fifteen (15) days at any one
shall not be permitted by this policy, unless specif
included by endorsement attached hereto.

Permission granted for such use of the premises
usual and incidental in the business, as cond
therein, of Wool Storage State kind of business

keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 228271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberlan Ohio Agency.

Dated June 14th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio, subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office Chicago Ill.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascer-

tainment, estimate, and satisfactory proof of the
have been received by this company in accordance
the terms of this policy. It shall be optional, how
with this company to take all, or any part, of the ar
at such ascertained or appraised value, and also
pair, rebuild, or replace the property lost or da
with other of like kind and quality within a reas
time on giving notice, within thirty days after the r
of the proof herein required, of its intention so t
but there can be no abandonment to this company o
property described.

This entire policy shall be void if the insured has
cealed or misrepresented, in writing or otherwise,
material fact or circumstance concerning this insu
or the subject thereof; or if the interest of the insur
the property be not truly stated herein; or in case of
fraud or false swearing by the insured touching any
ter relating to this insurance or the subject th
whether before or after a loss.

This entire policy, unless otherwise provided by a
ment indorsed hereon or added hereto, shall be vo
the insured now has or shall hereafter make or pro
any other contract of insurance, whether valid or not,
property covered in whole or in part by this policy;
the subject of insurance be a manufacturing estab
ment and it be operated in whole or in part at night
than ten o'clock, or if it cease to be operated for
than ten consecutive days; or if the hazard be incre
by any means within the control or knowledge of
insured; or if mechanics be employed in building, al
ing or repairing the within described premises for
than fifteen days at any one time; or if the interest of
insured be other than unconditional and sole owner
or if the subject of insurance be a building on gr
not owned by the insured in fee simple, or if the sub
of insurance be personal property and be or becom
cumbered by a chattel mortgage; or if, with the kn
edge of the insured, foreclosure proceedings be
menced or notice given of sale of any property co
by this policy by virtue of any mortgage or trust de
if any change, other than by the death of an insured,
place in the interest, title, or possession of the sub
insurance (except change of occupants without in
of hazard) whether by legal process or judgment
voluntary act of the insured, or otherwise; or if th
icy be assigned before a loss; or if illuminating
vapor be generated in the described building (o
cent thereto) for use therein; or if (any usage or

Exhibition

[illegible] or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, models, molds, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing or otherwise, nor for any greater proportion of the value of glass frames, frescoes, and decorations than this policy shall bear to the whole insurance

[illegible] application, survey, plan, or description of property [illegible] in this policy is a warranty by the insured.

[illegible] this insurance no person, un-

less duly authorized in writing, shall be deemed
agent of this company.

This policy may by a renewal be continued under
original stipulations, in consideration of premium for
renewed term, provided that any increase of hazard
be made known to this company at the time of ren
or this policy shall be void.

This policy shall be canceled at any time at the re
of the insured; or by the company by giving five
notice of such cancellation. If this policy shall be
celed as hereinbefore provided, or become void or
the premium having been actually paid, the unea
portion shall be returned on surrender of this poli
last renewal, this company retaining the customary
rate; except that when this policy is canceled by
company by giving notice it shall retain only the
rata premium.

If, with the consent of this company, an interest
this policy shall exist in favor of a mortgagee or o
person or corporation having an interest in the su
of insurance other than the interest of the insured
scribed herein, the conditions hereinbefore conta
shall apply in the manner expressed in such provi
and conditions of insurance relating to such inter
shall be written upon, attached, or appended here

If property covered by this policy is so endanger
fire as to require removal to a place of safety, and
removed, that part of this policy in excess of its pr
tion of any loss and of the value of property rema
in the original location, shall, for the ensuing five
only, cover the property so removed in the new loca
if removed to more than one location, such excess
policy shall cover therein for such five days in th
portion that the value in any one such new location
to the value in all such new locations; but this co
shall not, in any case of removal, whether to one o
locations, be liable beyond the proportion tha
amount hereby insured shall bear to the total ins
on the whole property at the time of fire, whet
same cover in new location or not.

If fire occur the insured shall give immediate n
any loss thereby in writing to this company, pro
property from further damage, forthwith separ
damaged and undamaged personal property, p
the best possible order, make a complete inve
the same, stating the quantity and cost of eac
and the amount claimed thereon; and, within s
after the fire, unless such time is extended in

Exhibits.

by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties hereto shall pay their appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture hereunder by any requirement, act, or proceeding on its

part relating to the appraisal or to any examin... herein provided for; and the loss shall not become ... able until sixty days after the notice, ascertainment, ... mate, and satisfactory proof of the loss herein re... have been received by this company, including an ... by appraisers when appraisal has been required.

This company shall not be liable under this polic... a greater proportion of any loss on the described ... erty, or for loss by and expense of removal from pre... endangered by fire, than the amount hereby insured ... bear to the whole insurance, whether valid or not, ... solvent or insolvent insurers, covering such property, ... the extent of the application of the insurance under ... policy or of the contribution to be made by this comp... in case of loss, may be provided for by agreement ... condition written hereon or attached or appended he... Liability for re-insurance shall be as specifically ag... hereon.

If this company shall claim that the fire was ca... by the act or neglect of any person or corporation, ... vate or municipal, this company shall, on payment of ... loss, be subrogated to the extent of such payment to ... right of recovery by the insured for the loss result... therefrom, and such right shall be assigned to this co... pany by the insured on receiving such payment.

No suit or action on this policy, for the recovery ... any claim, shall be sustainable in any court of law ... equity until after full compliance by the insured wi... all the foregoing requirements, nor unless commenc... within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, ... shall be held to include the legal representative of ... insured, and wherever the word "loss" occurs, it ... be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other comp... having special regulations lawfully applicable to its ... ganization, membership, policies or contracts of in... ance, such regulations shall apply to and form a pa... this policy as the same may be written or printed ... attached, or appended hereto.

This Policy is made and accepted subject to the ... going stipulations and conditions, together with ... other provisions, agreements, or conditions as may ... dorsed hereon or added hereto, and no officer, ag... other representative of this company shall have po... waive any provision or condition of this policy ... such as by the terms of this policy may be the ... of agreement endorsed hereon or added hereto; an...

such provisions and conditions no officer, agent, or representative shall have such power or deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,
Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland O., this 14 day of June 1926.

J. M. Bracken, Agent.

PLAINTIFF'S EXHIBIT No. 5.

No. 223. Stock Company. $5750.

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch. No. 75 Maiden Lane, New York.
Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire except as hereinafter provided, To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

On wool, including bags; and, provided the

insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insur-

Exhibits.

in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated June 24th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June, 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

By their Attorney duly authorized.

Hart Darlington, Manager.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed

hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this

policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and

shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 6.

(Package of cinders or ashes of burned wool, and is attached to bill of exceptions, but omitted from printed record by stipulation.)

PLAINTIFF'S EXHIBIT No. 7.

Non-Waiver Agreement

It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept 6 1926 to property located in rear lot W S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.

In The Event of the failure of the parties hereto to agree as to the amount of said loss and damage, the question of the amount thereof shall be determined by apprisal, as provided in the conditions of the policies of Insurance.

Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

The Sole Object And Intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto.

Exhibits.

Witness our hands in duplicate, this 15 day of Sept 1926.

J. M. Scott
Companies in interest.
A. C. Harrod, Adjuster.

Witness:
I. E. Stottsberry,
J. M. Bracken.

EXHIBIT No. 14.

To The Home Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.

Policy No. 173
Amount of Policy — $8000.00
Rate — 1.27
Premium — $101.60

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool

or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of The Home Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $8000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $20,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Exhibits.

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags.	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

No. 173

Stock Company
The Home Insurance Company
Organized 1853.

Amount $8000. Rate 1.27 Premium $101.60

In consideration of the stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does insure J. M. Scott for the term of one year from the sixth day of July, 1926, at noon, to the sixth day of July 1927 at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit;

Exhibits.

Form No. 212 attached to Policy.

Uniform Standard Ohio — Form No. 212 (Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming a part of Policy No. 173 of the Home Insurance Company New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York.

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist

or be claimed by the insured unless so written or attached.

In witness whereof this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized agent of the company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establi-

ment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but

liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions

and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the

amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the

loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 15.

To the New York Underwriters Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 21023
Amount of Policy—$3500.00.
Rate—1.27
Premium $44.45

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor

Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of New York Underwriters Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $3500.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $24,500.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at

Cumberland, Guernsey County, Ohio; this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building occupied as wool storage, situated west side of Cambridge street risk #50 map 117½.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York.	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½.

No. or Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
963327	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

Exhibits.

No. 21023. Stock Company.

New York Underwriters Insurance Company

New York

Amount $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage, by fire, except as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212 (Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated west side of Cambridge street, Book No. 50 Map 117½ City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other Insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said

building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 21023 of the New York Underwriters Insurance Company of New York City

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions.

conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio—786.

A. R. Stoddard, Secretary. R. M. Bissell, President.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Exhibits.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or

order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furn

a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or

condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 16.

To the Westchester Fire Insurance Company, of New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 969337
Amount of Policy—$5000.00.
Rate 1.48
Premium—$74.00.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage on premises owned by me.

Exhibits.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Westchester Fire Insurance Company, of New York, of its proportion of the above loss, under said policy, the sum of $5000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $23,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were

a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while

Exhibits.

contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.
Uniform Standard Ohio
Form No. 212
(Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.
Uniform Standard Ohio
Form No. 212
(Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.
Uniform Standard Ohio
Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.
Wool Form.

No. 969337. Organized 1837.

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $74.00.

In Consideration of the Stipulations herein named and of Seventy-four & No/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the first day of April 1926 at noon to the first day of April 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '24)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated West side of Cambridge Street Book No. 50 City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building; all only while in transit to and from said building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and

Exhibits.

the insurance, if any hereunder, on contents of any building here described, is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 969337 of the Westchester Fire Insurance Company of New York

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated April 1, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation, and is issued under and in pursuance of Sections 130, 131 and 132 of the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, President.

Countersigned at Cumberland, Ohio, this 1st day of April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any

material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein de-

scribed, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of

fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or solvent or insolvent insurers, covering such property, to the extent of the application of the insurance under this

policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured, for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 17.

To the Sun Insurance Office, Western Department, 76 West Monroe St., Chicago, Ill.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. C 288271.
Amount of Policy—$5750.00.
Rate—1.27
Premium—$73.02

By the policy of insurance above, a copy of which with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story

slate roof, frame building occupied for wool stora... on premises owned by me.

The said building containing said wool and wool ba... was occupied at the time of said fire for storage of wo... wool bags, frames for sacking wool, scales for weighi... wool, a cupboard containing books and tablets on whi... records were kept for the storage of said wool and wo... bags, and for no other purpose, except my son, Victo... Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to giv... a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Sun Insurance Office, Western Department, of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurement on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the

conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

[Notarial Seal.]

B. F. Enos,
Notary Public.

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags.	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
[illegible]	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the assured is legally liable therefor, this item shall also

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. [illegible] (Edition June 19[illegible])

Exhibits.

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland. No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office
63 Threadneedle St.
London, Eng.

U. S. Branch
54 Pine Street,
New York.

Amount $5750. Rate 1.27 Preminm $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to policy.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, im-

Exhibits.

provements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberland Ohio Agency.

Dated June 14th 1926 19.....

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the

Exhibits.

assured shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio.
subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office, Chicago Ill.

Name of Insurance Company

issued at its Cumberland, Ohio, Agency, Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if

the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage

by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained

shall apply in the manner expressed in such provi
and conditions of insurance relating to such intere
shall be written upon, attached, or appended here

If property covered by this policy is so endangere
fire as to require removal to a place of safety, and
removed, that part of this policy in excess of its pr
tion of any loss and of the value of property remai
in the original location, shall, for the ensuing five
only, cover the property so removed in the new loca
if removed to more than one location, such excess of
policy shall cover therein for such five days in the
portion that the value in any one such new location
to the value in all such new locations; but this comp
shall not, in any case of removal, whether to one or
locations, be liable beyond the proportion that
amount hereby insured shall bear to the total insura
on the whole property at the time of fire, whether
same cover in new location or not.

If fire occur the insured shall give immediate notice
any loss thereby in writing to this company, protect
property from further damage, forthwith separate
damaged and undamaged personal property, put it
the best possible order, make a complete inventory
the same, stating the quantity and cost of each arti
and the amount claimed thereon; and, within sixty d
after the fire, unless such time is extended in writ
by this company, shall render a statement to this co
pany, signed and sworn to by said insured, stating
knowledge and belief of the insured as to the time
origin of the fire; the interest of the insured and of
others in the property; the cash value of each ite
thereof and the amount of loss thereon; all incumbran
thereon; all other insurance, whether valid or not, cov
ing any of said property; and a copy of all the descr
tions and schedules in all policies; any changes in
title, use, occupation, location, possession, or exposu
of said property since the issuing of this policy; by wh
and for what purpose any building herein described
the several parts thereof were occupied at the time
fire; and shall furnish, if required, verified plans,
specifications of any building, fixtures, or machinery
stroyed or damaged; and shall also, if required, furn
a certificate of the magistrate or notary public (not
terested in the claim as a creditor or otherwise, nor
lated to the assured) living nearest the place of
stating that he has examined the circumstances and
knows the insured has honestly sustained loss to

amount that such magistrate or notary public shall certify;

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed upon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, pri-

vate or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property, of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid

...ntil countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,
Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland, O. this 14 day of June, 1926.

J. M. Bracken, Agent.

EXHIBIT No. 18.

To the Norwich Union Fire Insurance Society Ltd., 75 Maiden Lane, New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 223.
Amount of Policy—$5750.00.
Rate—1.27
Premium—$73.02.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given for forty thousand five hundred pounds of the same to the Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

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No assignment or transfer or incumbrance on said w... or said wool bags has been made, and no change in ... title, use, occupancy, location or possession of said pr... erty has occurred since the issuing of said policy, exc... said chattel mortgage to said The Cumberland Savin... Bank Company, of Cumberland, Ohio, as above stat...

The whole insurance, whether valid or not, coveri... any of said property involved at the time of said fire w... $28,000.00, and no more.

The actual cash value of the property described by t... aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Norwich Union Fire Insurance Society Ltd., of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the

Exhibits.

same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office, New York.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.
Uniform Standard Ohio
Form No. 212
(Edition June 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
[illegible]	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.
Uniform Standard Ohio
Form No. 212
(Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also

Exhibits.

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 211
(Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 211
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

No. 223. Stock Company. $5750

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch No. 75 Maiden Lane, New York

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named ... of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth

Exhibits.

day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire as hereinafter provided. To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge street risk 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

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Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland, O. Agency. Dated June 24th 1926

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition added hereto, and as to such provisions and conditions of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

By their Attorney duly authorized.

Hart Darlington, Manager.
J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any

fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

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This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building hereby described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and

specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost; at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this

policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 19.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio

Dear Sir:

The Home Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #173 of the Home Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered

policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Home Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,

Home Insurance Company

By A. C. Harrod,

Adjuster.

EXHIBIT No. 20.

Western Adjustment and Inspection Company

Branch Office

F. W. Sparrow, Manager

Hartman Building

Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio

Dear Sir:

The New York Underwriters Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #21023 of the New York Underwriters Insurance Company for loss said to

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have occurred by fire on the 6th day of September, 19

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but it is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The New York Underwriters Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the papers purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
New York Underwriters Insurance Co.
By A. C. Harrod,
Adjuster.

EXHIBIT No. 21.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio

Dear Sir:

The Westchester Fire Insurance Company has referred to the undersigned for reply the type-written statement

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purporting to be sworn to by you wherein claim is made by you under Policy #969337 of the Westchester Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Westchester Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereon caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Westchester Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 22.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Sun Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #C 288271 of the Sun Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Sun Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy;

Very truly yours,
Sun Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 23.

Western Adjustment and Inspection Company
Branch Office
F. W. Sperrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio

Dear Sir:

The Norwich Union Fire Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #223 of the Norwich Union Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Norwich Union Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Norwich Union Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 24.

Know All Men by These Presents: That J. M. Scott, Grantor in consideration of the sum of Eighteen Thousand Two Hundred Dollars to me paid by The Cumberland Savings Bank Company, Cumberland, Ohio, a corporation, Grantee the receipt of which is hereby acknowledged, do... hereby Bargain, Sell and Convey to the said Grantee their successors and assigns, the following described goods and chattels, to-wit: Being Forty Thousand five Hundred pounds of wool stored in barn located at rear of lot on west side of Cambridge Street, Cumberland, Ohio.

The Condition of this Conveyance is such that if the said J. M. Scott, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said The Cumberland Savings Bank Co., the sum of Eighteen Thousand Two Hundred Dollars, represented by various promissory notes of various dates and amounts and signed by said J. M. Scott, by Sarah R. Scott, and by both, then this conveyance shall be void; otherwise it shall be in full force.

It is further agreed that if default be made in the above conditions, or any part thereof, or if any secreting, or removal from their location, any abuse, or misuse, any sale, any seizure whatever by any process of law of said goods or chattels, or of any part of them, be either made or attempted by said mortgagor.., or by any person or persons claiming under ..... or in behalf of either, or by or in behalf of any creditor or creditors of said mortgagor.., or if from any other cause the security shall become inadequate, then said mortgagee.. or successors may take immediate possession of said property, or of any part thereof, wherever found, and sell same at public or private sale, for the highest price ..... can obtain, and pay indebtedness and expenses. And it is further agreed that said mortgagee.. or successors may insure said property for ..... benefit, during the continuance of this mortgage, and at the expense of said mortgagor.. the cost of said insurance to be secured by this mortgage; and further, that in default of payment of said money, or any part thereof, then said mortgagee.. or successors may sell said property at public or private sale, for the highest price ..... can obtain, and shall apply the proceeds of said sale to the payment of said indebtedness and interest thereon, and of all reasonable and necessary costs, including the cost of filing, recording and refiling this mortgage, and said costs of insurance, and shall pay the residue, if any, to said mort-

Stipulation.

gagor.. or successors. Otherwise said property is to be and remain in the peaceable possession of said mortgagor.. or legal representatives.

And the said mortgagor hereby covenants and agrees to, and with said mortgagee, his executors, administrators and assigns, that he is the true and lawful owner of the above described property, and has good right to sell, convey and incumber the same; and that the same is free from all incumbrances whatsoever.

In Witness Whereof, the said J. M. Scott and Sarah R. Scott, his wife have hereunto set their hands this 19 day of June A. D. 1926.

J. M. Scott
Sarah R. Scott.

Hazel Scott
L. A. Claypool

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

STIPULATION—Filed September 22, 1928.

The proposed bill of exceptions in the above entitled actions which by order of the Court were consolidated for the purpose of trial and tried in one trial having been duly presented by counsel for defendants and the same having been examined and allowed by counsel of both parties hereto by agreement, it is therefore stipulated and agreed that the foregoing Bill of Exceptions is correct and that it contains all the evidence offered and received and a correct reference to all the exhibits introduced and true and correct copies of the same and of all the proceedings had on trial of said cause.

It is further stipulated that this Bill of Exceptions as engrossed be settled, allowed, and signed by Honorable Benson W. Hough, Judge of said Court, in accordance herewith.

It is further stipulated and agreed between all parties to each of the above entitled causes that Plaintiff's Ex-

Notice of Appeal.

hibit 6, which consists of cinders of burned wool, becau[se] of the impossibility of printing same, need not be print[ed] as a part of the record in any of the above entitled cau[ses] but that the said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party.

F. S. Monnett,
Attorney for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendants.

NOTICE OF APPEAL.—Filed September 22, 1928.

Norwich Union Fire Insurance Society, Ltd., the defendant, hereby gives notice to the plaintiff, J. M. Scott, that it appeals from the judgment entered in this cause.

Mooney, Bibbee & Edmonds,
Its Attorneys.

Waiver.

J. M. Scott, the plaintiff herein, hereby acknowledges service upon him of the foregoing written notice of appeal, waives the issuance, or service upon him, of any further notice of appeal or citation, and enters his general appearance herein for all purposes of appeal. Bond demanded. No waiver as to time or form of Bill of Exceptions.

J. M. Scott, Plaintiff.
By F. S. Monnett,
His Attorneys.

PETITION FOR APPEAL—Filed September 22, 1928.

To the Hon. Benson W. Hough, Judge, of the United States District Court, for the Southern District of Ohio, Eastern Division, Aforesaid:

Now comes the Norwich Union Fire Insurance Society, Ltd., defendant herein, by its attorneys, and respectfully shows that on the 15th day of June, 1928, the jury duly impaneled, by direction of the Court, found a verdict against your petitioner and in favor of the above named plaintiff and upon said verdict a final judgment was entered by this court in favor of the plaintiff on the 7th day of August, 1928, against your petitioner, the defendant herein, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of error which is filed with this petition.

Your petitioner, the defendant herein, further respectfully says and shows that this is an action for recovery upon a policy of fire insurance issued by the defendant, your petitioner, to the plaintiff, J. M. Scott; and that this is an action in which a direct review of the decision of the United States District Court may not be had in the Supreme Court of the United States under Section 238 of the United States Judicial Code, or Title 28, Section 345, United States Code Annotated, as amended by the act of February 13th, 1925; that this case is one in which, under the legislation (Section 128 of the United States Judicial Code or Title 28 Section 225 of the United States Code Annotated of 1928) in force when the act of January 31st, 1928 was passed, a review could be had in the United States Circuit Court of Appeals, Sixth Circuit, on writ of error to said judgment of the United States District Court.

Your petitioner feeling itself aggrieved by the aforesaid verdict and judgment entered thereon as aforesaid, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit and prays for reversal of said judgment and hereby petitions the court for an order allowing it to prosecute an appeal to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided for the correction of errors so complained of and herewith assigned, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals and that an order may be made fixing the amount of security to be given upon said

Assignment of Errors.

appeal by your petitioner, the defendant herein, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings and the execution of the judgment may be suspended, superseded and stayed and that a supersedeas be issued until the determination of said appeal by said United States Circuit Court of Appeals for the Sixth Circuit.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Petition for Appeal.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed September 22, 1928.

Now comes the defendant in the above entitled case, Norwich Union Fire Insurance Society, in connection with its petition for appeal, and makes and files the following assignment of errors which it avers occurred upon the trial of this action and upon which it will rely in the prosecution of its appeal to reverse the judgment of this honorable court:

1. The Court erred in entering judgment in favor of the plaintiff and against the defendant for the sum of Six Thousand Four Hundred and Twelve dollars and fifty cents ($6412.50) and costs, or any other sum.

2. The court erred in its order overruling the defendant's motion for a new trial, and in each ground thereof, to which order the defendant then and there excepted.

3. The court erred in its order overruling the defen

ant's motion at the close of plaintiff's case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

4. The court erred in its order overruling the defendant's motion at the close of all of the evidence submitted in the case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

5. The court erred in overruling the motion made by the defendant at the conclusion of the statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the statement of the case by plaintiff's counsel upon the ground that upon the statement of the case by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

6. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel, separately and combined with the original statement, the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

7. That the verdict of the jury and the decision and judgment of the court are contrary to the law and the evidence.

8. That the verdict of the jury and the decision and judgment of the court are manifestly against the weight of the evidence.

9. That the verdict of the jury and the decision and judgment of the court are not sustained by sufficient evidence or by any evidence submitted in the case.

10. There was error and abuse of discretion in the order of the court in consolidating this action for trial with four other actions pending in this court, to which the defendant at the time objected and excepted.

11. The court erred in directing the jury to return a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

12. The court erred in not submitting to the jury the issue as to the amount of the loss, to which the defendant at the time excepted.

13. The court erred in admitting in evidence and refusing to rule out on defendant's motion testimony of

the plaintiff to the effect that the premium paid by the plaintiff for the policy in suit had not been tendered back by the defendant to the plaintiff before or after this suit, to each of which rulings the defendant at the time excepted, including the following testimony:

"Q. I will ask you whether any of these premiums have ever been tendered back to you either before or after this suit?

Mr. Edmonds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant, the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes, I thought you had answered?

A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted."

14. The court erred in admitting in evidence testimony of the plaintiff that the defendant or its agents did not cancel or tender back anything to cancel a former policy issued by the agent, to which ruling the defendant at the time excepted, including the following testimony:

"Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court: Objection overruled, exceptions noted.

The Witness: He did not."

15. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, to which ruling the defendant then excepted, testimony of the plaintiff to the effect that the soliciting agent who countersigned the policy in suit knew that the plaintiff was giving, or had given, a chattel mortgage on a part of the wool described in the policy, including the following testimony:

"Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable

clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that the evidence proposed to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an incumbrance by chattel mortgage, the entire policy shall be void, whereas, the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court.

The defendant's exceptions may be noted.

(Question read.)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I borrowed from them. Now, let me just—

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said, 'If you do, I will go to the office'. He had company at home; his office was in the First National Bank of our town. I said, 'No, it isn't necessary, you can write it

out Monday morning and mail it, so I will get it thro[ugh] the mail; I am away from home during the week, [and] I will send you a check for the money', which he di[d].

Mr. Edmonds: Motion to rule out the answer and [each] part thereof, on the ground that it is a violation of [the] parol evidence rule.

The Court: You don't have to restate these reas[ons] we haven't time to listen to any dissertation upon [it] each time. Your motion to exclude the answer is ov[er]ruled and your exceptions are noted, for the reas[ons] announced in the objection to the question.

Q. I will ask you the same question, as to what, [if] anything was said to I. E. Stottsberry, the agent's na[me] appearing at the bottom of the policy, Exhibit No. [2], Westchester Fire Insurance Company, as to there be[ing] any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this que[s]tion as the former, and the same reasons announced, and the court overrules the objection and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Mo[r]nett, possibly the conversation took place on Saturday and I expect that policy will be dated on Monday. I remember very well I went down to his home, it was on Saturday evening.

Q. Had that lien existed on there up as early as the other policy, April 1, 1926? A. No, sir."

and including the following testimony of J. M. Brack[ett]

"Q. Do you recall of Mr. Scott giving a chattel mo[rt]gage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage

Mr. Edmonds: He asks, do you recall of Mr. [Scott]

giving a chattel mortgage and we object; first, upon the ground, that the evidence disclosed a dual agency here which, in no event, would impute knowledge to this company Second, evidence tending to show knowledge to the agent is a violation of the parol evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exceptions by each of the defendants."

16. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, the testimony of the plaintiff as to conversation between plaintiff and A. C. Harrod—who signed the non-waiver agreement on behalf of the insurance companies, including defendant—after the non-waiver agreement was signed, and as to the examination of the premises made after the fire by said Harrod and as to the requests and demands claimed to have been made by A. C. Harrod of the plaintiff that the plaintiff obtain a list of the farmers from whom the plaintiff claimed to have purchased the wool which the plaintiff claimed was damaged by the fire in question; and as to the claimed statement of Harrod that he would come back and check up with the plaintiff some time and that nothing further would be required of the plaintiff and that there would be no trouble; and that they would have a settlement and that in the meantime plaintiff would get a form such as was usually sent out but that the plaintiff should pay no attention to that; and that the plaintiff should go right ahead and gather up this wool; and the testimony that he procured the data claimed to have been requested by said Harrod; and the testimony that said Harrod did not call for any statement prepared by the plaintiff, including the following testimony:

"Q. State what was said by this adjuster, between you, further, as to the fire, give it in order the best you can from start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and using the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of

the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: Insofar as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted."

and including the following testimony:

"Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that these parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can save your exceptions.

Q. What requirement did he then make of you. A. He asked me, he said, 'Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them'. I says, 'I will do the best I can', I says, 'I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment'. I had bought before this and shipped several carloads the same season. He said, 'You can remember'. I says, 'It is a pretty big thing', I says—I told him I would do the best I could.

"Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the

best I could and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

"You may state to the jury— A. I haven't told you all. Q. Go ahead? A. Then he says, 'Well, Scott, I wouldn't know any way to say but the one, you have to'. He says, 'It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss'. 'Well', I says, 'I recognize that fact, but,' I says, 'Wouldn't my oath amount to something in its'? He said the oath wouldn't do. I says, 'I will still say what I said prior to this, I will do the best I can'. I says, 'I don't know how soon I can do it; we will go right at it. I will go and see my son and go at it'. I says, 'The roads are in such a condition, we can't travel by automobile'.

"Q. Unimproved roads?

"A. Yes, unimproved roads. He says, 'that is about all that can be done until you get proof of loss, and I will come back and check up with you sometime'. I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, 'Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me'. and he says 'No'. He says, 'You get that gathered up, Scott, and there will be no trouble; we will have a settlement'. He says, 'In the meantime you will get a form like that we usually send out, but you pay to attention to that, you go right ahead and gather up this wool'. I says, 'I will do it'.

Motion by counsel for defendants to strike out each and every part of the answer on the same ground.

The Court: Same ruling and same exception."

and included the following testimony:

"Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the ground heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exceptions noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

Order Allowing Appeal.

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said awhile ago, through mud roads where he could not go by automobile."

17. The verdict of the jury and the finding and judgment of the Court and each of them was excessive.

18. And for other errors apparent upon the face of the record.

Wherefore, the defendant prays that said judgment of the District Court of the United States for the Southern District of Ohio, Eastern Division, in favor of plaintiff and against the defendant, be reversed and that said Circuit Court of Appeals render judgment in favor of this appellant which said district court should have rendered or that said District Court be directed to grant a new trial of said cause.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Assignment of Errors.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ORDER ALLOWING APPEAL—Filed September 22, 1928.

This day came the defendant, Norwich Union Fire Insurance Society, Ltd., by its attorneys, and filed herein and presented to the court, its assignment of error, and petition for allowance of an appeal intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment here

was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court in open court does allow the appeal, upon the defendant giving bond according to law in the sum of $6700.00 to the approval of this court, which shall operate as a supersedeas bond.

Hough, J.

BOND ON APPEAL—Filed September 22, 1928.

Know All Men By These Presents: that we, Norwich Union Fire Insurance Society, Ltd., as principal, and the Great American Indemnity Insurance Company of New York, as surety, are held and firmly bound unto J. M. Scott in the full and just sum of Six Thousand Seven Hundred Dollars ($6,700) to be paid to the said J. M. Scott, his attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of September, 1928.

Whereas lately, at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit pending in said Court between J. M. Scott as plaintiff, and Norwich Union Fire Insurance Society, Ltd., as defendant, a judgment was rendered against the said Norwich Union Fire Insurance Society, Ltd., and the said Norwich Union Fire Insurance Society, Ltd., having obtained an order allowing appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the plaintiff citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 22nd day of October, next.

Citation.

Now the condition of the above obligation is such that if the said Norwich Union Fire Insurance Society, Ltd. shall prosecute its said appeal proceeding to effect, and answer for all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force, virtue and effect.

Norwich Union Fire Insurance Society, Ltd.
By R. M. Edmonds,
Attorneys for Principal, Norwich Union Fire Insurance Society, Ltd.

Great American Indemnity Company of New York.
By Frank J. Macklin,
Attorney in Fact.

Sealed and delivered in the presence of:
B. M. Ryan,
Bertha Hathaway.

Approved by:
Hough, United States District Judge.

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Bond on Appeal.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorney for Plaintiff.

CITATION—Filed September 22, 1928.

United States Circuit Court of Appeals, for the Sixth Circuit.—Calvin Coolidge, President of the United States of America, ss.—To J. M. Scott, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the 22nd day of October next—within 30 days from the date hereof—pursuant to a petition for appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein Norwich Union Fire Insurance

Stipulations.

ciety, Ltd., is appellant and you are appellee to show cause, if any there be, why the judgment rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 22nd day of September, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the United States of America the one hundred and fifty-second.

Hough,
Judge of the District Court.

Service of the above Citation is hereby acknowledged and appearance of appellee is hereby entered.

F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for Plaintiff.

No. 2560—J. M. Scott v. The Home Insurance Company of New York.

No. 2561—J. M. Scott v. New York Underwriters Insurance Company.

No. 2562—J. M. Scott v. Westchester Fire Insurance Company of New York.

No. 2563—J. M. Scott v. Sun Insurance Office.

No. 2564—J. M. Scott v. Norwich Union Fire Insurance Society, Ltd.

STIPULATION—Filed September 22, 1928.

It is stipulated by and between each and all of the parties to the above entitled cases and their attorneys that a single narrative form bill of exceptions under the captions of all of the above entitled cases may be filed, settled, allowed, signed and used for all purposes as and for the narrative form bill of exceptions in each of the above entitled cases as fully as if separate narrative form bills of exceptions were filed in the several cases.

J. M. Scott, Plaintiff,
By F. S. Monnett,
Attorney for Plaintiff;

The Home Insurance Company,
New York Underwriters Insurance Company,
Westchester Fire Insurance Company,
Sun Insurance Office,
Norwich Union Fire Ins. Society,
By Mooney, Bibbee & Edmonds,
Attorneys for each Defendant.

STIPULATION—Filed September 22, 1928.

In the above entitled cause it is stipulated that the printed record may be, by the Clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon appeal in said cause.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Dated this 21 day of September, 1928.

PRECIPE FOR TRANSCRIPT—Filed September 22, 1928.

To the Clerk:

The clerk of this court is hereby instructed by the defendant in the foregoing entitled cause to make up transcript of the record of said cause in said court for transmission upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and in making up the same to include therein the following pleadings, documents and exhibits, being all of the record in said cause, except summons, subpoenas and returns thereon, and motion directed to said petition and rulings thereon, to wit:

1. Transcript of record of Common Pleas Court of Guernsey County, Ohio, with pleadings and petition, bond and order for removal filed therein and the full transcript on removal.
2. Amended Petition.
3. Second Amended Petition.
4. Answer to Amended Petition.
5. Answer to Second Amended Petition.
6. Reply to Answer to Second Amended Petition.

7 and 8. Orders showing order of consolidation and impaneling and swearing of jury and trial in progress.

9. Verdict for plaintiff.

Precipe for Transcript.

10. Defendant's motion for a new trial.
11. Entry overruling motion for a new trial and entering judgment.
12. Order extending time for filing bill of exceptions.
13. Bill of Exceptions, Narrative form statement of the evidence as approved by the Court.
14. Notice of appeal and acknowledgment of Service.
15. Petition for appeal.
16. Assignment of errors.
17. Order allowing appeal.
18. Bond on Appeal.
19. Citation and acknowledgment of service thereof.
20. All stipulations of counsel filed herein.
21. Precipe for transcript.
22. Clerk's certificate to judgment roll.
23. Clerk's certificate to transcript of record.
24. All other pleadings, proceedings, papers, orders, records, and minutes which are or may become part of the record in this cause with the exception of those papers hereinbefore expressly stipulated as though to be excluded.

The foregoing transcript shall be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

Please deliver all papers to Toothaker & Rodenfels, printers, Columbus, Ohio.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

Service of copy of the foregoing directions to the Clerk for making up transcript of record on appeal in said cause is hereby acknowledged this 22nd day of September, 1928.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, Harry F. Rabe, clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Columbus, Ohio, this.....day of.....1928.

.....

Clerk.

By.....,

Deputy.

JOURNAL ENTRY—Filed October 15, 1928.

It being made to appear to the court that under stipulation between counsel in the record, Plaintiff's Exhibit 6, which consists of cinders of burned wool, because of the impossibility of printing the same, need not be printed as a part of the record in the above entitled cause, but that said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party, it is considered and ordered upon request of Appellant that said original Exhibit 6 be returned and transmitted by the clerk of this court with the transcript of the record in this court to the clerk of the United States Circuit Court of Appeals.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 20, 1928)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

MOONEY, BIBBEE & EDMONDS,
First National Bank Bldg.,
Columbus, Ohio.

CAUSE ARGUED IN PART

(December 4, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are argued in part by Rolland M. Edmonds for Appellants and by F. S. Monnett for Appellee and are continued until tomorrow for further argument.

CAUSE FURTHER ARGUED AND SUBMITTED

(December 5, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are further argued by R. M. Edmonds for Appellants and by Elwood Murphy and F. S. Monnett for Appellee and are submitted to the Court.

JUDGMENT

(Filed December 12, 1930)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the District Court remitting the interest from the date of the fire until December 4th, 1926; otherwise, the judgment will be reversed.

OPINION

(Filed December 12, 1930)

Before MOORMAN and HICKENLOOPER, Circuit Judges, and KILLITS, District Judge.

MOORMAN, Circuit Judge: These suits were brought in the state court and were removed by the several defendants to the federal court, where they were consolidated. Each of them sought a recovery upon a policy of fire insurance issued upon wool including woolen bags belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of in-

surance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." This latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was shown by the proofs that on June 19, 1926, the plaintiff executed a mortgage on the property to the Cumberland Savings Bank Co., and that this mortgage was subsisting with the principal unreduced at the time of the fire. It further appeared though that the mortgage had not been verified nor deposited for record as required by the Ohio Statutes. Upon this latter evidence the court concluded that it was not a mortgage but was only a collateral contract and, being of opinion also that no other valid defense was made out, directed verdicts for plaintiff for the full amount of the policies with interest.

The statutes of Ohio provide: Section 8650, a mortgage of chattels "which is not accompanied by an immediate delivery * * * shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section"; Section 8561, such a mortgage "must be deposited with the county recorder of the county where the mortgagor resides"; and Section 8564, "the mortgagee, * * * before the instrument is filed, must state thereon, under oath, the amount of the claim, and that it is just and unpaid." We do not find from the language of these statutes that the failure of the mortgagee to comply with them vitiates the mortgage as between him and the maker. It has been ruled that it does not by the courts of Ohio. *Hutchins* v. *The Cleveland*

Mutual Ins. Co., 11 O. S. 477; *Francisco, et al.* v. *Ryan*, 54 O. S. 307; *Boyer* v. *Knowlton Co.*, 85 O. S. 104; *York* v. *Cassel*, 201 U. S. 344. Hence upon this point we think the court was wrong and that it must be held that the mortgage was an encumbrance within the meaning of the policy provisions relied upon.

Three of the policies, those issued by the Sun Insurance Office, the Norwich Union Fire Insurance Society, and the Home Insurance Company, carried riders providing that any loss occurring under the policies that might be proved to be due the assured should "be payable to the assured and Cumberland Savings Bank Company, subject, nevertheless, to all the terms and conditions of the policy." Two of them, those issued by the New York Underwriters Company and the Westchester Fire Insurance Company, carried no such clause. It is claimed by plaintiff, as to these latter policies, that Stottsberry, the local agent who wrote them, was informed or knew of the mortgage, and hence, under *Foster* v. *Scottish Union & National Insurance Co.*, 101 O. S. 180, and *Hartford Fire Ins. Co.* v. *Glass*, 117 O. S. 145, there were waivers of the policy provisions prohibiting the encumbering of the property. There are two objections to this contention: The first is, the question is not controlled by Ohio law but is one of general jurisprudence, *Hartford Company* v. *Nance*, 12 Fed. (2d) 575 (6 C.C.A.); the other, the contracts of insurance specifically provide that a waiver may be made only in a designated way, and there was no attempt to effect waivers in that way in these cases. We held in both the Nance case and *Hartford Co.* v. *Jones*, 15 Fed. (2d) 1 (6 C.C.A.), that such provisions were binding upon the parties to the contract, and that where the policy contained such a provision, knowledge of the local agent of the forbidden condition did not effect a waiver of the policy provision. There is in our opinion no escape from the application of those cases to the two policies here in question.

Nor did the defendants' failure to tender a return of the premiums that were paid on the policies operate to estop them from urging the effectiveness of the policy provisions. *United States Life Insurance Co.* v. *Smith*, 92 Fed. 502 (6 C.C.A.); *Georgia Home Insurance Co.* v.

Rosenfield, 95 Fed. 358 (6 C.C.A.); *Kentucky, etc., M. Co.* v. *Norwich Union Fire Insurance Society*, 146 Fed. 695. Neither did the action of the adjuster, immediately after the fire, in investigating the loss, amount to a waiver of the breach of those provisions. The evidence shows that plaintiff granted the adjuster permission to make a full investigation, and agreed that such action as he might take in that respect would not constitute a waiver nor invalidate any of the conditions of the policies. It was under this agreement and with the full consent of plaintiff that the adjuster acted. Plaintiff was nowhere misled or prejudiced by his investigation, and certainly it ought not to result in a waiver of a provision with which it had no legal connection. We hold that it did not and also, that the trial court should have directed verdicts for the New York Underwriters and the Westchester Fire Insurance Companies. Whether there are grounds for and the plaintiff may yet seek reformation of the policies issued by those companies are matters not presented on this record. See reference to Northern Assurance Co. case in *Forkner* v. *Twin City Fire Ins. Co.*, 19 Fed. (2d) 419 (6 C.C.A.).

As to the policies with riders providing that any loss occurring under the policies should be payable to the assured and the Cumberland Savings Bank Company, the question is different. In two decisions by this court —*Commercial Union Fire Insurance Co.* v. *Marshall, etc.*, 18 Fed., (2d) 457, and *Firemen's Insurance Co.* v. *Brooks*, 32 Fed. (2d) 451—it has been held that such a rider is tantamount to an indorsement in accordance with the provisions of the policy permitting an encumbrance of the property. It is true that the policies in those cases provided for payment of the loss as "interest may appear"; but under the circumstances we do not think a legal distinction can be founded upon the absence of that phrase from these policies. Nor is *Bates* v. *Equitable Insurance Company*, 10 Wall. 33, inconsistent with that conclusion. In that case there was no evidence "outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured," and hence the question became determinable upon implications arising from the

indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, "the case might be different." In the case at bar the riders appear to have been affixed to the policies by an agent of the company who was also an officer of the mortgagee bank. These riders were in the form and were attached in the manner provided for in the policies, and it is to be presumed, nothing to the contrary appearing, that the agent attaching them acted with full authority. The purpose in attaching them was to grant authority to encumber the property. The language used was that of the insurance companies and was sufficiently comprehensive for the purpose for which it was intended. The reasoning of Judge Hook in the dissenting opinion in the *Atlas Reduction Company* case, 138 Fed. 509, is therefore directly applicable. In the Brooks case, supra, this court chose to follow and apply that reasoning rather than that of the majority opinion. And it was stated in the Brooks case that "if there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is at least not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." In this case it clearly appears that the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage. They are sufficiently comprehensive, as we have said, for that purpose, and being so intended, they seem to us to be quite as effective as they would have been had they contained the further phrase "as interest may appear."

Complaint is made of the court's ruling in consolidating the cases and hearing them together. We think that action was proper. The main question in each case was

that of liability, and each case was decided upon its own facts. There is no showing anywhere in the record that any one of the defendants was prejudiced by the trial of its case with the others. Nor in our opinion was it error to permit plaintiff to proceed with the trial without making the mortgagee bank a party plaintiff. The insurance companies agreed in case of loss to pay the money to the insured and the bank. They could have made the bank a party to the proceedings if they had wanted to. They preferred, apparently, not to do so but to litigate the claim with the party to whom the primary liability was due. After doing this they cannot be permitted to say that the judgment should be reversed because the bank was not a party. Furthermore, there is yet time for them to obtain any protection that they may be entitled to as against the bank, for when the case is remanded, the court below will see to it, no doubt, that the money is paid into court to be held until the rights therein as between the plaintiff and the bank are determined.

The remaining defense relates to arbitration. The policies provided, in the event of disagreement as to the amount of the loss, the same should be ascertained by arbitration, the insurance companies and the insured each to select an arbitrator, and the two so chosen to select an umpire. They further provided that no suit or action on the policies for the recovery of any claim should be maintained in any court of law or equity until there had been full compliance by the insured with all the terms and requirements of the policies. There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained.

It results from the foregoing that the lower court was right in directing verdicts against the Sun Insurance Office, the Norwich Union Fire Insurance Society and the Home Insurance Company. The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed. For the reasons hereinbefore stated the judgments against the New York Underwriters Company and the Westchester Fire Insurance Company are reversed.

KILLITS, District Judge, dissenting:

In *United States Fidelity and Guaranty Co. v. Guenther*, 31 Fed. (2d) 919, 920, this Court cited *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 463, to the effect that the contract provisions involved in the case then before it are manifestly "to be construed according to the sense and meaning used, and, if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense." In that connection *Thompson* v. *Phoenix Insurance Co.*, 136 U. S. 287, 297, was also cited to the point that if the policy "is so drawn as to require interpretation and to be fairly susceptible to two different constructions, the one will be adopted that is most favorable to the insured."

These citations were the premise to a comment that "resort cannot be had to this latter rule to nullify the plain and obvious provisions of an insurance policy. * * * But the question remains whether the language used is in fact susceptible to a double meaning, or, otherwise expressed, whether it will fairly and reasonably support that construction upon which liability of the insurer may be sustained."

Sanborn, Judge, in *Insurance Co.* v. *McNulty*, 157 Fed. (C.C.A.) 224, 226, referring to the second rule above quoted said: "But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured."

The dissent, which, regretfully, I feel impelled to offer to the majority opinion respecting the three cases considered involving, respectively, the policies issued by the Norwich Union, Sun and Home Insurance Companies, is founded altogether on what seems to me to be the right application to the facts of each of these cases of the principles above stated. I would make but one supplement, the propriety of which seems to me to be above question, that, when the consideration is of a rider or indorsement upon a policy of insurance, offered as a waiver of a plain provision of the contract, which waiver, as provided in another contract provision, can be effective only when it meets the plain terms of such a permitting provision, such attempts to waive must also come for interpretation as to effect under the same rules of construction as the contract itself.

In *Atlas Reduction Co.* v. *New Zealand Insurance Co.*, 138 Fed. (C.C.A.) 497, the precise question was present which, in the instant cases, is fundamental to the division in this Court, i. e., the effect of a rider upon the policy, offered as a waiver of a defeasance provision exactly in the terms of provisions of that character in the contracts before this Court. The parallel is completed in the fact that also the terms of a clause in the contract there specifying how, only, a waiver could be effected, are *ipsissimis verbis* of similar provisions in the present contracts.

In the majority opinion in the Atlas case, by Vandeventer, Judge, the following from *Fire Insurance Company* v. *Coos County, supra*, equally pertinent to the instant cases, is quoted:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other;

and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue to terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

This majority opinion proceeds to state the controlling question in that case as follows:

"What, in view of the plain and unambiguous stipulations in the policy, is the meaning and interpretation of this loss payable indorsement. Obviously, the words used therein must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision or condition thereof waived, only by a writing of equal dignity and credit with the policy itself."

Then followed a pertinent quotation from *Northern Assurance Co.* v. *Grandview Building Co.*, 183 U. S. 308, 364, a decision the importance of which to a consideration of the instant situation should not be overlooked.

The point now involved can be no more clearly stated than in the language of the foregoing from the Atlas majority opinion. It is true that this Court, in decisions referred to later herein, has favored Judge Hook's dissent in that case, but, as we read the divergent opinions, the division there was a difference of judgment whether the waiver rider peculiar to that case, was reasonably in conformity to the terms of the contract by compliance with which, only, a waiver could be effective.

It is convenient here to re-state the pertinent language of the several policies involved in this discussion providing for avoidance of the contracts and for the manner in

which, only, right to avoid by the insurer may be waived. The policies differ but in the placing of the paragraph which is numbered one, below. In the Home and Norwich Union policies it is on the face of the contracts, preceding the stipulations we number herein two and three, whereas in the Sun instrument, it follows two and three, but, in each instance, it is addressed to the same stipulations. The quotation is from the Home policy, and the italics are mine.

1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the *subject of agreement* endorsed hereon or added hereto, and as to such provisions and conditions *no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver*, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured *unless so written or attached.*

2. This entire policy, unless otherwise provided *by agreement* indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; * * *.

3. If, with the *consent* of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

My view is, that to be effective, the indorsement or rider, claimed to work a waiver, as provided in the stipulation numbered one, above, must be so worded that the

acceptance of it by the insurer should be regarded as an *agreement* to continue the contract in spite of the otherwise avoiding presence of a mortgage lien; i. e., that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgagee.

In *Assurance Company v. Grandview Building Association, supra,* it was held—183 U. S., 361, that the

"limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture,* dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts,* ratified the action of the agent." (Italics mine.)

The sweeping effect of this decision and its continued unabated authority, applicable to the instant situations, is not open to question—recognized frequently and recently by this Court in unison with all other federal tribunals.

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

In the Atlas case the rider waiver, whose sufficiency was questioned, was: "Subject to all of the conditions of this policy, loss, if any, payable to D. & S. *as their interest may appear.*" The majority holding was that this language did not "in terms or by implication consent to the incumbrance created by the chattel mortgage." Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase "as interest may appear"

was used in such cases to refer to a chattel mortgage interest. This Court, in *Commercial Union Insurance Company* v. *Marshall*, 18 Fed. (2d) 457, 458, 459, where the rider was: "any loss * * * proven to be due to the insured on this policy shall be held payable to D. *"as interest may appear"*, indicated its preference for Judge Hook's reasoning and conclusion, but found that it "expressly appeared," in the record before it, "that according to the usages and practices of the community and of these insurance companies, this phrase 'as interest may appear' was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest." It was also held, independently of Judge Hook's view in the Atlas case, that "the stipulation that the loss should be payable to Dacus 'as interest may appear' * * * applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter."

In *Firemen's Insurance Company* v. *Brooks*, also by this Court, 32 Fed. (2d) 451, the rider was, page 451, "Any loss * * * shall be payable to Thomas Trimby, *as interest may appear*, subject, nevertheless, etc." In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be aplpicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit."

In the Sun and Norwich Union cases the waiver rider was attached nearly a week after the chattel mortgage had been given, and nearly two weeks after the policies had issued. In the Home case that was done contemporaneously with the issuance of the policy. Upon this

phase, this Court in the Brooks case observed, page 452, 18 Fed., 2nd,

"One distinction may be suggested, inherent in the facts of the Atlas Case. The loss payable clause was there added after the policy had been some time in force. There was a distinctly greater possibility that the insured might be using the policy as security in some way disconnected from the property, so that "interest" might mean interest in the proceeds only rather than interest in the property, than there could be in a case where the clause is simultaneous with the policy,—for the loss payable clause is the customary means of protecting a then existing interest in the property."

The foregoing concerning Judge Hook's position in the Atlas case, and the view of this Court in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase "as interest may appear" in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof. These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that when that is done the insurer is called upon only to consider whether in case of loss it will honor such an appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq., 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See, also, the Bates case, *infra*. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity

exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties, while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent "where plain and unequivocal language is employed."

I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the "as interest may appear" decisions, for that important phrase is entirely absent. Its wording is: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

Secondly, there is not the slightest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is "in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest", i. e., chattel mortgage interest.

In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted

stipulations which the majority considers it to qualify these three factors and, absolutely, nothing else.

The majority apparently does not agree with this and I therefore hesitatingly proceed to take issue with certain fact statements in the majority opinion. Therein it is said of the riders: "The purpose of attaching them was to grant authority to encumber the property by chattel mortgage." Aside from the fact that there was a mortgage, I can not find anything on the record to support that statement. All that catches my attention is that, without comment, the riders were offered and received as attachments to the several policies and that Bracken, the issuing agent, said this and nothing more: "At that time I attached the loss payable clause to those policies as agent for the companies." Even this language is ambiguous as to time and supports an incorrect inference, for the Sun and Norwich Union policies were issued June 14, the mortgage executed June 19, and the riders attached June 24, while the Home policy issued July 6 bearing the rider attached as of that date. Hereafter will be discussed the equivocal position of Bracken which deserves consideration when is sought to be decided the capacity in which he attached the riders.

Nor am I able to find in the record any testimony or proof supporting this in the majority opinion: "The language (of the riders) used was that of the insurance companies." This Court, in Marshall's case (18 Fed., 2nd, 457, 459), apparently entertained no criticism of Judge Hook's notice of customs (138 Fed., 514). If we may follow that precedent and consider, as Judge Hook said, "as a matter of common knowledge" what, "among those having to do with fire insurance either as agent of insurers or as insured," was the form of a loss payable clause, adopted by companies doing fire insurance business in Ohio, as the uniform standard for Ohio, used for years before, and in 1926, and ever since, to this time, it would be found to include this pregnant phrase, which Bracken did not employ even by implication: "As their (the payees') respective interests may appear."

The majority opinion invites attention to the "circumstances" of the instant cases, under which it is of the opinion that no "legal distinction (between Judge Hook's

opinion and those in the Marshall and Brooks cases) can be founded upon the absence of that additional phrase (as interest may appear) from these policies." There are, indeed, unusual circumstances shown exclusively upon the records before us, but these, so far from diminishing the importance of the absence of the critical phrase, in my judgment emphasizes the necessity of using it if the rider was to operate as a waiver of the lien inhibition.

First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued. Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market. His proof of loss admits that this property cost him in 1925 $34,800 and that its value at the time of the fire was but $28,700, a shrinkage in value of seventeen and one-half per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926, or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200, "represented (language of chattel mortgage) by various promissory notes of various dates and amounts," signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8,000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,500, was at the same time cashier of the chattel mortgagee bank. August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy. August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again

bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved "several times to see Mr. Scott (the insured) on business." The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

I draw no inferences from these facts save, 1. That Scott was in losing and involved circumstances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used.

Crass stupidity may explain why Bracken failed to protect his bank against Scott's creditors and used a defective rider, but a more reasonable explanation, considering that he had been chosen to hold two responsible positions, is that he had some purpose to serve thereby, for these omissions are correlated. However, the circumstances noted do not appear to me to have the effect, suggested by the majority, to render of no consequence the absence of the customary "interest" phrase.

One matter does however so stand athwart the situation as to greatly weaken the plaintiff's case by destroying one inference which otherwise might be helpful and

that is Bracken's duality of representative obligations when he acted in attaching the riders. These were then incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and, correspondingly to the disadvantage of his insurance principals. This incompatible duality makes it impossible to attribute to the insurers any act of his which favored either the bank or the insured through the bank. *Mulrooney* v. *Royal Insurance Company*, 163 Fed., 833, 835, 9 C.C.A.; *Arispe Mercantile Company*, v. *Capitol Insurance Company*, 133 Iowa, 272, s.c., 9 L. R. A., N. S., 1034, and annotations; *American Surety Company* v. *Pauly*, 170 U. S. 133; *Aetna Indemnity Company* v. *Sthroeder*, 12 N. D. 116. Consequently it may not be charged against the insurers that they, through their agent, produced and attached the riders. We have, therefore, as I look at it, nothing in this record to serve our judgment of the effect of the riders, save the inhibiting stipulations of the contracts, the provisions for waiving those stipulations and the wording of the alleged waiver.

It is difficult for me to see how any support for the majority position is found in the three "as interest may appear" cases. I do not entertain any question whatever but that our Marshall and Brooks cases were rightfully decided. But to go beyond them, and to ignore, while still using them, the critical fact upon which each depended, is, I think, without justification. When they are eliminated from the majority opinion it seems to be entirely without precedent, unless it be the Bates case soon to be discussed.

As I construe the language of this rider it tends to rebut an impression that the Bank held an interest in the insured property, of whatever sort, because if its right to participation in a recovery in consequence of such interest existed at all, the measure of that recovery would be the extent of the interest—here the direction is that damages "*due the assured*" are to be "payable to the assured" *and*, the Bank, divided on apparently equal terms between them. There is nothing which, once the direction is accepted by the insurer, requires the latter to go behind its terms to see that the extent of the Bank's

interest in recovery is exactly protected—it casts upon the insurer no duty of inquiry whatever.

The insurance practice, noted by Justice Miller in the Bates case, *infra*, and Judge Denison in the Marshal case, of appointing, as co-payee of a loss, one who has no interest in the subject of insurance, is a factor of interpretation in such cases as we have here—one upon which the issuing companies were entitled to rely, and which this Court should also consider. It is also noteworthy that the provision for a waiver of the defeasance clause says that the attached or indorsed waiver shall take the form of an "agreement" to waive. The question, therefore, is whether this rider achieves the dignity of an "agreement" to waive a very serious moral hazard, not referred to therein, and which the terms of the contract inhibit without a specific agreement.

I am unable to see the slightest ambiguity whatever in the language of the rider in these cases—it is just what it might well be to make the Bank a mere appointee in proceeds of recovery alone, with no suggestion that that appointment is based upon a subsisting interest in the corpus. Riders and indorsements of no less equivocal or ambiguous character than this have been before the courts to be interpreted to that result. One citation, still authoritative, which the majority cites, is sufficient for the present discussion. In *Bates* v. *Equitable Insurance Company*, 10 Wallace, 33 U. S. 33, where a policy contained the usual covenant that if the property were sold the insurance ceased unless the insurer consented in writing, it was held that an indorsement that the policy was "payable, in case of loss, to E. C. Bates" followed by the insurer's indorsement that "consent is hereby given to the above indorsement" did not imply either a knowledge or consent to a sale of the insured property. In this case the property had been sold to Bates, the appointee. In it, as here, there was, as noted by Mr. Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or of usage and custom which qualified the language used, wherefore the Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the Company, that any loss sustained by Philbrick, covered

by that policy, should be paid to Bates." As to this case the majority opinion says: "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which "the case might be different," wherefore, here, as in the Bates case, "the question becomes determinable upon implication arising from the indorsements (rider) alone."

My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that "resort cannot be had," in a case such as here, to the rule respecting resolution of ambiguities, because there is here no "double meaning" for that here the language used will not "fairly and reasonably support that construction upon which liability of the insurer may be sustained," and that our judgment should be, as in the Westchester and New York Underwriters cases, that the trial court should have directed verdicts for the defendants whose cases are herein considered.

The majority opinion savors, in my judgment, of a controversion of Judge Sanborn's injunction, *Insurance Company* v. *McNulty, supra,* that the rules as to ambigu-

ities cannot be permitted "to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the assured." Judge Hook, concluding his dissent in the Atlas case (page 516, 138 Fed.) says of the decision of the Supreme Court in the Northern Assurance case, *supra*, that by it "the tendency to the unrestrained invasion of the clear terms of policies of insurance by oral testimony which was so destructive of the rights of the companies has been well checked." It seems to me that the majority position tends to lower the bars to such invasion which the Supreme Court erected. The majority conclusions appears to me, also, inconsistent with the decisions of this court in the Nance and Jones cases, 12 Fed. 2nd 575, Syllabus 5, and 15 Fed. 2nd 1, Syllabus 3.

Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the matter of what knowledge the insurers had of the purpose of the riders that counts. They convey no hint of a chattel mortgage and there is not a scintilla of proof that the insurers knew anything about it whatever. As the language of the riders is without ambiguity, sufficient and reasonable to perform a far different office well known in insurance practice, it does not suffice to put the insurers on inquiry, even if the longest period, June 24 to September 5, may be considered a reasonable time for such inquiry by these particular companies.

There is no proof or even pleading that any one of the three companies knew of the mortgage, or had the slightest hint that the Bank was interested in the insured property in any way; nor is there proof or pleading that it was intended by this phraseology to convey such information to any insurer, or to have the rider work the

waiver of the defeasance clause of the contract. The insured, Scott, knew, by the character of the answer, that defense would be made that the rider was inadequate to serve the purpose for which the majority of this Court now holds it is sufficient. He had his opportunity, which is not yet lost, to reform the contract if he has proof with the essential qualifications which would make reformation possible at equity, wherefore there is no place here, *ex debito justiciae*, to relieve him, even if that were justifiable in these straight actions at law. Respectfully it is urged that courts, even Appellate Courts, should be slow, especially in cases at law, to relieve parties from the consequence of ineptitude or carelessness in presentation.

In my judgment the fact is not significant that in the Home case the issuing of the policy and the attachment of the rider were simultaneous, whereas in the other cases the rider was attached to an old policy.

As intimated I concur in the disposition by the majority of the Westchester and New York Underwriters cases. The Home, Sun and Norwich Union cases clearly seem to me to deserve the same findings and order.

CERTIFIED COPY OF REMITTITUR

(Filed December 20, 1930)

APPLICATION

Now comes the plaintiff, J. M. Scott, and asks leave of Court to file a remittitur of the excessive amount of judgment heretofore rendered in this Court, in the following cases, to-wit:

J. M. Scott v. *The Home Insurance Company of New York*, No. 2560.

J. M. Scott v. *Sun Insurance Company*, No. 2563.

J. M. Scott v. *Norwich Union Fire Insurance Society, Ltd.*, No. 2564.

On the ground that the United States Circuit Court of Appeals of the Sixth District, on the 12th day of December, 1930, affirmed the judgment of this Court in said respective cases; as to the excessive amount used the following language:

"The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed."

The remittiturs are hereto attached to this Application, under mark of Exhibit A, B, and C respectively, containing the amount of the excessive interest, as ordered remitted in said appellate decision.

(Signed) J. M. SCOTT, *Plaintiff*,
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

REMITTITUR

Be It Remembered that on the trial of this case before the United States District Court for the Southern District of Ohio, Eastern Division, on the 12th day of December, 1930, it appeared that there had been an excessive amount of interest computed in the verdict and judgment in case No. 2564 from the 6th day of September, 1926, to the 4th day of December, 1926, a period of ninety days amounting to the sum of $86.25.

And therefore, the said J. M. Scott, plaintiff herein, by F. S. Monnett, one of his attorneys, freely remits to the said Norwich Union Fire Insurance Society, Ltd., defendant herein the sum of $86.25 interest on said sum of $5750.00, being interest computed for said ninety days.

(Signed) J. M. Scott, *Plaintiff,*
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

Application of J. M. Scott, plaintiff in the cases set forth in said application, has been made to this Court for leave to file his remittiturs in said cases on the grounds therein named. Granted.

It is ordered that the Clerk of this Court prepare certified copies of said remittiturs and forward same to the Clerk of the Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio.

(Signed) Hough, *Judge.*

A True Copy of the Original
Filed December 19, 1930.

Attest: Harry F. Rabe, Clerk
by James H. Clark, Deupty.

(Seal)

JUDGMENT ON REMITTITUR

(Filed January 6, 1931)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

The Court having filed its opinion and appellee, J. M. Scott, having thereupon filed in this court a certified copy of the remittitur entered in the court below, whereby it appears that said J. M. Scott consents to remit from the judgment theretofore rendered, the interest from the date of the fire until December 4, 1926.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, as so reduced, be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed February 10, 1931)

The petition for rehearing of this cause is hereby denied, Judge Killits dissenting.

MOTION TO STAY MANDATE

(Filed February 13, 1931)

To the Honorable United States Circuit Court of Appeals, Sixth Circuit, and the Judges Thereof:

Now comes Norwich Union Fire Insurance Society, Ltd., the appellant in the above entitled cause, and shows to this Court that the appellant desires to and will, file with the United States Supreme Court a petition for a writ of certiorari from the United States Supreme Court in this cause, and that it is necessary in order to facilitate and make possible the filing of and to enable this appellant to file such petition for a writ of certiorari and to secure the granting of such writ of certiorari by the Supreme Court of the United States, that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and withheld until March 16, 1931.

Wherefore, appellant prays that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and with-held until March 16, 1931.

Mooney, Bibbee and Edmonds,
Attorneys for Norwich Union Fire Insurance Society, Ltd.
Appellant and Applicant.

Dated February 13, 1931.

ORDER STAYING MANDATE

(Filed February 13, 1931)

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date,—provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof or, if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Norwich Union Fire Insurance Society, Ltd.*, v. *J. M. Scott,* No. 5279, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of February, A. D. 1931.

J. W. MENZIES
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(912)

FILE COPY

MAR 9 193

CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 29

NORWICH UNION FIRE INSURANCE SOCIETY, LTD., PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROLLAND M. EDMONDS,
33 N. High St., Columbus, Ohio,
Counsel for Petitioner.

JAMES JOYCE,
Cambridge, Ohio;
ELWOOD MURPHY,
Grand Theatre Bldg., Columbus, Ohio;
F. S. MONNETT,
35 E. Gay St., Columbus, Ohio,
Counsel for Respondent and Appellee Below.

(35,702)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 780

NORWICH UNION FIRE INSURANCE SOCIETY, LTD., PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is one of five cases at law commenced by the respondent, the plaintiff below, against your petitioner,

the defendant below, and four other insurance companies, which were brought in the State Court of Ohio and removed to the United States District Court for Southern Ohio upon the ground of diversity of citizenship, where the five cases were consolidated by order of the District Court. Two of these five cases, in which the New York Underwriters Insurance Company and the Westchester Fire Insurance Company were defendants below, terminated in judgments by the United States Circuit Court of Appeals, Sixth Circuit, reversing the judgments of the District Court, which had been in favor of the plaintiff below, and are therefore not here for consideration. There was but one opinion rendered by the Circuit Court of Appeals in passing upon the merits of all five of the cases.

Identical petitions for writs of certiorari and identical briefs in support thereof are now filed in this Court by the defendants below, Sun Insurance Office, Norwich Union Fire Insurance Society, Ltd., and The Home Insurance Company, against each of which judgments were rendered by the District Court (R. 45), and affirmed by the United States Circuit Court of Appeals, Sixth Circuit (R. 248), by a divided court.

Each of these suits sought a recovery upon a policy of fire insurance issued upon wool, including woolen bags, belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows (R. 34, 35): "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest

of the insured be other than unconditional and sole ownership, * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision (Sun Insurance Office, R. 132, 133, Exhibit 4; Norwich Union Fire Ins. Soc., R. 135, Exhibit 5; Home Ins. Co., R. 104, 105, Exhibit 1) that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was admitted in the pleading (R. 21, 28) and established without dispute (R. 58) that on June 19, 1926, the plaintiff executed a chattel mortgage on the property to the Cumberland Savings Bank Company, and that this chattel mortgage was subsisting with the principal unreduced at the time of the fire.

Endorsed upon the policy in suit was the following loss-payable clause (Sun Ins. Office R. 127) (Norwich Union Fire Ins. Soc. R. 13[illegible] (Home Ins. Co. R. 104):

"Loss Payable Clause.

"Any loss under this policy that may be proved due shall be payable to the assured and

The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The question involved in view of the foregoing is whether, as held by the majority opinion of the Court of Appeals, this loss-payable clause, which neither mentioned a chattel mortgage nor described the payee therein as chattel mortgagee nor recognized any property right in such payee in the property insured, constituted a written waiver of the prohibited chattel mortgage.

The policy in suit further provided (Sun Insurance Office R. 131) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 109) that, in the event of disagreement as to the amount of loss, the same should be ascertained by appraisers, the insurance company and the insured each selecting an appraiser and the two so chosen to select an umpire, and that the award in writing of any two should determine the amount of such loss.

The policy further provided (Sun Ins. Office R. 132) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 110) that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until after full compliance by the insured with all the above requirements, and that the loss should not become payable until sixty days after such ascertainment, including an award by appraisers (R. pages 109-110).

After the fire and before any communications whatever were had by the insurance company, or any rep-

resentative thereof, with the plaintiff below, a written non-waiver agreement was signed and entered into by and between the parties (R. 141, 142), which provided, in part, as follows:

> "It is hereby mutually stipulated and agreed that any action taken by the insurance company or companies, signing this agreement, in ascertaining the amount of loss and damage which occurred September 6, 1926 to property located in rear lot W/S of Cambridge St. Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.
>
> "Notice is hereby given and accepted, and it it hereby mutually understood and agreed, that no representative of any insurance company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing."

After sworn proofs of loss, in which the plaintiff set forth his claim as to the amount of loss, were furnished by the plaintiff below to the defendant insurance company (Sun Insurance Office R. 175, Exhibit 17) (Norwich Union Fire Insurance Society R. 187, Exhibit 18) (Home Insurance Company R. 142, Exhibit 14), and the defendant insurance company advised the plaintiff below in writing that the defendant insurance company disagreed with the plaintiff below as to the amount of the loss caused by the fire in question, as stated in his proof of loss (Exhibit 19, Home

Insurance Company R. 198, (Exhibit 22, Sun Insurance Office R. 202) (Exhibit 23, Norwich Union Fire Insurance Society, Ltd., R. 203), then, without further communication, oral or written, between the parties, the plaintiff below commenced the present suit without obtaining an award of appraisers fixing the amount of the loss, or making any demand or request therefor. The disagreement between the parties as to the amount of loss and plaintiff's failure to obtain an award of appraisers as to the amount of the loss were alleged by the defendant below in its answer (R. p. 34).

In the face of these undisputed facts, and in spite of the rule settled by the Supreme Court of Ohio and binding upon the Federal courts, that such disagreement as to the amount of loss made the procurement by the insured of an award of appraisers fixing the amount of the loss a condition precedent to any right of action, the District Court held (R. pp. 94, 95) that no obligation rested upon the insured, plaintiff below, to obtain an award of appraisers as a condition precedent to a right of action on the policy. The United States Circuit Court of Appeals, on the other hand, in its majority opinion, while recognizing that an award of appraisers was a condition precedent to a right of action, held that the performance of such condition precedent by the plaintiff below had been waived, because, as the Circuit Court of Appeals said in its opinion, "the defendant denied liability before suit was brought and after it was brought" (R. 229).

There is no evidence whatever in the record of any denial of liability by the insurance company prior to

the commencement of suit, and the only action taken by the defendant insurance company after commencement of suit was its action in filing its answer, in which it pleaded two defenses, as permitted by the statutes of Ohio: (1) The defense of failure by the plaintiff below to perform the condition precedent of the contract as to appraisal, and (2) the further consistent defense of incumbrance of the property by chattel mortgage, in violation of the terms of the policy.

Another question involved, in view of the foregoing, is whether, as held by the majority of the Court of Appeals, an insurance company whose only dealings with the insured after a loss are under a non-waiver agreement, and whose only communication with the insured consisted of a written disagreement with the insured as to the amount of the loss without in any way denying liability, and whose only action after suit is brought is the filing of an answer setting up two consistent defenses (as here, failure to obtain an award of appraisers and violation of the condition prohibiting incumbrance by chattel mortgage), can be deemed to have waived, or held to be estopped to set up, the insured's non-performance of the appraisal condition.

The trial in the United States District Court was by jury and a verdict and judgment by direction of the District Court were rendered in favor of the respondent, J. M. Scott, and against the petitioner herein, Norwich Union Fire Insurance Society, Ltd., for $6,412.50, which included interest from the date of the fire (R. 45). An appeal from said judgment was taken by the petitioner herein, Norwich Union Fire Insurance So-

ciety, Ltd., to the United States Circuit Court of Appeals, Sixth Circuit (R. 206 to 222), which affirmed the judgment of the United States District Court (R. 248) by a divided court (see dissenting opinion of Judge Killetts, R. 230-245) after a certified copy of a remittitur of the interest from the date of the fire, September 6, 1926, until December 4, 1926, had been filed (R. 246, 247) in accordance with the order of the United States Circuit Court of Appeals (R. 224). A petition for rehearing was filed in the United States Circuit Court of Appeals by your petitioner herein on January 9, 1931 (R. 249), and was denied, Judge Killetts dissenting, on February 10, 1931 (R. 261).

II.

Reasons Relied Upon for Allowance of the Writ.

A.

The majority decision of said Circuit Court of Appeals in holding that the appointment of a creditor to receive the proceeds of a fire-insurance policy by written endorsement on the policy of a loss-payable clause, which by its terms is expressly made subject to all the conditions of the policy, is a written waiver of a condition of the policy prohibiting chattel mortgage, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497 (opinion by Judge Van Devanter).

B.

The majority decision of said Circuit Court of Appeals as to the effect of the loss-payable clause attached to the policy in suit, by holding that such loss-payable clause—though by its express terms it was "subject to all the terms and conditions of the policy", and though such loss clause contained no reference to chattel mortgage and no description of the payee as chattel mortgagee or as having any interest whatever in the property—is nevertheless a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage, there being no pleading or proof of a course of dealing between the parties or of usage and custom qualifying the unambiguous language used, has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; including the decision by this Court in

Bates vs. Equitable Insurance Co., 10 Wall. 33.
Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

C.

The majority decision of said Circuit Court of Appeals in considering and basing its decision upon a custom, when not pleaded or in evidence, and ingrafting a meaning into a contract by construction based upon such assumed, unpleaded and unproven custom, where the written contract is clear and unambiguous and not open to construction (Majority Opinion, R. 227-228), has decided an important question of general law in a way probably untenable or in conflict with the weight

of authority and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Bates vs. Equitable Insurance Company, 10 Wall. 33.

D.

The majority decision of said Circuit Court of Appeals while professing to hold, in accordance with the law as settled by this Court, that knowledge of the insurer's agent, not communicated to his principal, of the prohibited incumbrance by chattel mortgage may not be imputed to the insurer to effect a waiver or estoppel under the form of insurance contract here involved, has, nevertheless, in its opinion, in fact given effect to evidence of such claimed knowledge by the agent in deciding that "the purpose in attaching the loss-payable clause was to grant authority to incumber the property", and in holding that "the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage" (R. 228). Such decision by the majority of the Circuit Court of Appeals is an erroneous decision of an important question of general law, and a decision in conflict with the law as settled by this Court on the question.

Northern Assurance Company vs. Grand View Building Association, 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Company, 216 United States Reports, 311 (1910), Syl, and pp. 321-322.

Mutual Life Insurance Co. vs. Hilton Green, 241 United States Reports, 613, 624 (1916).

Ætna Life Insurance Company vs. Moore, 231 United States Reports, 543, 559 (1913).

Prudential Insurance Company vs. Moore, 231 United States Reports, 560—Syl. 3 (1913).

E.

The majority decision of said Circuit Court of Appeals in holding that an insurance company, which simply disagrees with the insured's claim as to the amount of the loss without denying liability prior to suit, and which, subsequent to suit, merely files an answer alleging the defense of failure by the insured to perform the condition precedent as to appraisal of the amount of loss and alleging further a defense of incumbrance by chattel mortgage in violation of the terms of the policy, has thereby waived performance by the insured of the appraisal condition precedent of the policy, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

Insurance Company vs. Carnahan, 63 Ohio State, 258, Syllabi 5 and 7.

Graham vs. Insurance Co., 75 Ohio State, 374.

Edward Everett Co. v. Great American Insurance Company, 9 Ohio *nisi prius* Reports (new series), 241 (affirmed 81 Ohio State, 573).

Fire Association vs. Agresta, 115 Ohio State, 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd), 754.

F.

The great importance to the business world and the insuring public, as well as the legal profession, and the need of an authoritative and elucidating decision by this Court as to the legal and operative effect of a loss-payable clause of the form here involved, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict of opinion between the various Circuit Courts of Appeal and the judges of the United States Circuit Court of Appeals in this case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 5279, Norwich Union Fire Insurance Society, Ltd., appellant, *vs.* J. M. Scott, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit

be reversed by this Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet, just and proper.

NORWICH UNION FIRE IN-
SURANCE SOCIETY, LTD.,
By ROLLAND M. EDMONDS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 780

NORWICH UNION FIRE INSURANCE SOCIETY, LTD., PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinions in the United States Circuit Court of Appeals, Sixth Circuit, which have not yet been reported, appear: Majority Opinion (R. 224-230); Dissenting Opinion (R. 230-245).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 6, 1931 (R. 248).

The petition for rehearing filed by this petitioner January 9, 1931 (R. 249), was denied February 10, 1931 (R. 261), Judge Killetts dissenting.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is *Judicial Code, Section* 240, as amended by the act of February 13, 1925, Chapter 229 (43 Statutes at Large, pp. 938, 939) (28 U. S. C. A. No. 347).

3. This is a civil action in the United States Circuit Court of Appeals for the Sixth Circuit in which a judgment has been rendered against this petitioner (R. 248) and in which a petition for rehearing has been filed (R. 249) and denied (R. 261).

The jurisdiction of this Court is invoked upon the several grounds specifically assigned in the petition submitted herewith and hereafter summarized in this brief under the heading "Specification of Errors."

4. The cases believed to sustain such jurisdiction are as follows:

Forsyth vs. Hammond, 116 United States Reports 506, 514, 515.

Delk vs. St. Louis & San Francisco R. R. Co., 220 United States Reports, 580-586.

Lau Ow Bew vs. United States, 144 United States Reports, 47, 58.

III.

Statement of the Case.

This case has already been stated in the preceding petition for writ of certiorari under subdivision I, headed "Summary Statement of the Matter Involved" pp. 1-8.

Supplementary thereto and with particular reference to the increase of hazard involved in the prohibited incumbrance by chattel mortgage in the instant case, we quote the following additional facts in the language of the dissenting Circuit Court of Appeals opinion of Judge Killetts (R. 239-240), with appropriate record pages added thereto:

> "First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued (Exhibits 4 and 5, R. 125, 133). Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market (R. 78). His proof of loss admits that this property cost him in 1925 $34,800.00, a shrinkage in value of 17½ per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926 (R. 78), or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200 (R. 76),

'represented (language of chattel mortgage) (Exhibit 24, p. 204) by various promissory notes of various dates and amounts', signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,000, was at the same time cashier of the chattel mortgagee bank (R. 81). August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy (R. 78). August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved 'several times to see Mr. Scott (the insured) on business.' The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

"I draw no inferences from these facts save, 1. That Scott was in losing and involved circum-

stances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used."

IV

Specification of Errors.

1. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in finding and holding, though the loss-payable clause by its express terms was subject to all the terms and conditions of the policy, and though the loss-payable clause contained no reference to chattel mortgage and no description of the payee as a chattel mortgagee or as having any interest whatever in the property, and though the loss-payable clause did not contain the words "as interest may appear", that nevertheless

the loss-payable clause in this case constituted a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage in the entire absence of pleading or proof of a course of dealing between the parties, or of usage, or custom, qualifying the unambiguous language used.

2. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in altering the clear and unambiguous language of the written insurance contract by a construction thereof based upon a supposed custom or usage assumed by the court, and for which there is no foundation either in the pleadings or the evidence or in point of fact.

3. The Circuit Court of Appeals for the Sixth Circuit in construing and declaring the effect of the clear and unambiguous language of the loss-payable clause and the policy in suit erred in this action at law, in which there was no pleading or proof of fraud or mutual mistake, in considering and giving effect to the claimed knowledge of this petitioner's local soliciting agent of the incumbrance by chattel mortgage, which knowledge was acquired in his capacity as cashier of the adversely interested payee bank, and was not communicated to the insurance company.

4. The Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that an insurance company has waived performance by the insured of the appraisal condition precedent of the policy when the insurance company has simply disagreed with the insured's claim as to the amount of the loss without deny-

ing liability prior to suit, and when subsequent to suit the insurance company has merely filed an answer alleging the defense of failure by the insured to perform this condition precedent as to appraisal of the amount of the loss, and alleging a further defense of incumbrance by chattel mortgage in violation of the terms of the policy.

V.

Summary of the Argument.

1. THE LOSS-PAYMENT CLAUSE RIDER WAS NOT A WAIVER OF THE PROHIBITED INCUMBRANCE BY CHATTEL MORTGAGE.

Point A. The provision in the policy prohibiting chattel mortgage without consent endorsed in writing thereon, intended as it is to reduce the moral hazard, is valid, and violation thereof by incumbrance of any of the property insured constitutes an entire defense.

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Mulrooney vs. Royal Insurance Co., 163 Fed. 833 (C. C. A. Iowa, 1908), First Syllabus, p. 835.

Hartford Fire Ins. Co. vs. Downey, 223 Fed. 707 (C. C. A. W. Va. 1915), Syllabus, pp. 712, 715.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schild, 69 O. S. 136.

National Fire Ins. Co. vs. Kneidel, 11 O. C. C. (N. S.) 193 (Hamilton County).

Hammel vs. Insurance Co., 24 O. C. C. 101 (Pickaway County).

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Point B. The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office, well known in insurance practice, of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

Atlas Reduction Company vs. New Zealand Ins. Co. (C. C. A., Judge Van Devanter), 138 Fed. 497-508.

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

Point C. Even though the loss-clause rider had contained the added words "as interest may appear", which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Insurance Co. (District Court, Southern District, Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A., Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

Point D. The absence in the loss-clause rider here in question of the phrase "as interest may appear" upon which alone the dissenting opinion in *Atlas Reduction Co. vs. New Zealand Ins. Co.*, 138 Fed. 487, and the other decisions cited by the majority, were based, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar wholly without precedent and in direct conflict with the controlling decision of this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

1. IF, AS THE MAJORITY ASSERT, THE ABSENCE OF THE PHRASE "AS INTEREST MAY APPEAR" IS WITHOUT SIGNIFICANCE, THEN THE MAJORITY OPINION IN THE INSTANT CASE IS IN SQUARE CONFLICT WITH THE FOLLOWING CORRECTLY DECIDED CASES:

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla., 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A. Kansas, 1903), 120 Fed. 916.

Point E. Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," and that if insurance contracts

(as here) "are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

Insurance Co. vs. McNulty, 157 Fed. C. C. A. 224, 226.

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther (Decided Feb. 24, 1930), 281 U. S. 34.

Point F. The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with its clear wording, upon a supposed custom or usage assumed by the majority and for which there is no foundation in the pleadings or the evidence or in point of fact.

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Point G. The loss-clause rider in the instant case was not a waiver of the prohibited incumbrance by chattel mortgage because the loss-clause rider was not informative to the insurer of the existence of the inhibited lien, and the knowledge of the insurer's agent of such lien may not be imputed to his principal under this form of policy—no actual knowledge by the insurer being otherwise shown.

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Northern Assurance Co. vs. Grand View Building Asso., 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605.

Penman vs. St. Paul Fire & Marine Ins. Co., 216 United States Reports, 311 (1910).

Mutual Life Ins. Co. vs. Hilton Green, 241 United States Reports, 613.

Ætna Life Ins. Co. vs. Moore, 231 United States Reports, 543.

Prudential Insurance Co. vs. Moore, 231 United States Reports, 560.

Point H. Knowledge of the insurer's agent, Bracken, of the inhibited lien and his act in preparing this form of loss-clause rider may not be imputed to his insurance company principal for the additional reason that he was then acting in a dual, incompatible capacity for his bank principal, on the one hand, and for his insurance company principal, on the other.

Point I. The importance to the insuring public and to the insurance companies of an authoritative judicial declaration as to whether it is possible by the form of loss-clause rider here employed to secure a creditor of the insured who has no interest by way of mortgage or otherwise in the insured's property against the casualty of fire without thereby thrusting the materially increased hazard of chattel mortgage incumbrance upon the insurer, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict between the

Circuit Courts of Appeals, including the Judges of the Circuit Court of Appeals in the instant case.

2. NON-COMPLIANCE BY THE INSURED WITH THE CONDITION PRECEDENT REQUIRING APPRAISAL OF THE AMOUNT OF THE LOSS WAS A BAR TO THE INSURED'S RECOVERY.

Point J. The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of loss without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against incumbrance by chattel mortgage, did not waive its right to legal performance by the insured of the condition requiring an award of appraisers fixing the amount of the loss as a condition precedent to the insured's right of action on the policy.

Insurance Co. vs. Carnahan, 63 Ohio State 258.

Graham vs. Insurance Co., 75 Ohio State 374.

Edward Everett Co. vs. Great American Ins. Co., 9 Ohio *Nisi Prius* Reports (New Series) 241, (Affirmed 18 Ohio State 573).

Fire Association vs. Agresta, 115 Ohio State 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd) 754.

ARGUMENT.

I. The Loss-payable Clause Rider.

POINT A.

The policy provision prohibiting chattel mortgage without consent thereto endorsed in writing upon the policy is valid, and violation thereof constitutes an entire defense.

The insurance contract in suit expressly provides:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

The validity of this clause prohibiting incumbrance by chattel mortgage, and the proposition that violation thereof is an entire defense to any recovery on the policy, is settled by an unbroken line of decisions both by the Federal courts and the courts of Ohio,

Mulrooney vs. Royal Ins. Co. (C. C. A. Iowa, 1908), 163 Fed. 833.

(Page 835:)

> "That a mortgage of personal property increases the insurance hazard is not disputed. Provisions in insurance policies that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing upon the policy, are valid provisions. Atlas Reduction Co.

v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 777, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Assurance Co. *v.* Bldg. Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases therein cited."

As this court held in

Carpenter vs. Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 510,

"the underwriters did not rely so much upon the principles as upon the interest of the insured."

To the same effect are:

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Hartford Fire Ins. Co. vs. Downey (C. C. A., W. Va., 1915), 223 Fed. 707, 712, 715.

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

National Fire Ins. Co. vs. Kneidel, 11 Ohio Circuit Court (N. S.) 193, Hamilton County.

Hammel vs. Ins. Co., 24 Ohio Circuit Court, 101, Pickaway County.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schield, 69 O. S. 136.

POINT B.

The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office well known in insurance practice of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

It is the unquestionable legal right of an insured to select and nominate for coparticipation in the proceeds of his contract a person who has no interest of any kind in the insured property. When that is done, the insurer is called upon only to consider in case of loss whether it will honor such appointment. As held in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497:

> "Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, skill, and success in trade, but who requires some indemnity against such accidents as loss by fire."
>
> "It is not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss."

See also

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

and minority opinion by Judge Killetts in the instant case (R. 236, last paragraph, and R. p. 244).

POINT C.

Even though the loss-clause rider had contained the added words "as interest may appear," which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

The exact language of the loss-payable-clause rider in the case at bar is as follows (R. 127):

> "Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The provisions of the policy pertinent to this discussion are the following, as quoted in the dissenting opinion (R. 233):

> "1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such pro-

visions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

"2. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

"3. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply to the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

It was squarely held in

Atlas Reduction Co. vs. New Zealand Ins. Co.,
(Majority opinion by Judge Van Devanter), 138 Fed. 497,

as to a loss-clause rider identical with that in the instant case, except that the rider there contained the additional words "as interest may appear," which are significantly absent here, that—

"(e) The endorsement does not give consent to the incumbering of the insured personal property by a chattel mortgage (1) because it does not mention a chattel mortgage, or describe D. & S. as chattel mortgagees, or show

that the attention of the parties was directed to a chattel mortgage; (2) because it was not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss; and (3) because the words 'subject to all the conditions of this policy' show that the conditions were not intended to be abrogated or waived, but to have effect and be respected as if the indorsement had not been made, and among the conditions of the policy are these: 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage * * * and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy * * * unless such waiver, if any, shall be written upon or attached hereto."

and (Opinion, p. 508)—

"that the indorsement did not in terms or by implication consent to the incumbrance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance."

To the same effect are:

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Green (C. C. A. Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

POINT D.

The absence from the loss-clause rider here in question of the phrase "as interest may appear," upon which was based the dissenting opinion in the Atlas Reduction Co. Case, 138 Fed. 497, and the other decisions cited by the majority of the Circuit Court of Appeals, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar without precedent and in direct conflict with a controlling decision of this court.

This proposition cannot be more admirably stated than in the language of Judge Killetts in his able dissenting opinion in the case at bar (R. 234-235; 236-238):

> "In the Atlas Case (138 Fed. 497) the rider waiver, whose sufficiency was questioned, was: 'Subject to all of the conditions of this policy, loss, if any, payable to D. & S. as their interest may appear.' The majority holding was that this language did not 'in terms or by implication consent to the incumbrance created by the chattel mortgage.' Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase 'as interest may appear' was used in such cases to refer to a chattel mortgage interest. This Court (Sixth Circuit) in Commercial Union Insurance Company v. Marshall, 118 Fed. (2) 457, 458, 459, where the rider was: 'any loss * * * proven to be due to the insured on this policy shall be held payable to D. as

interest may appear', indicated its preference for Judge Hook's reasoning and conclusion, but found that it 'expressly appeared', in the record before it, 'that according to the usages and practices of the community and of these insurance companies, this phrase "as interest may appear" was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest.' It was also held, independently of Judge Hook's view in the Atlas case, that 'the stipulation that the loss should be payable to Dacus "as interest may appear" • • • applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter.'

"In Firemen's Insurance Company *v.* Brooks, also by this Court, 32 Fed. (2nd) 451, the rider was, page 451, 'Any loss • • • shall be payable to Thomas Trimby, as interest may appear, subject, nevertheless, etc.' In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." • • •

"The foregoing concerning Judge Hook's

position in the Atlas case, and the view of this Court (Sixth Circuit) in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase 'as interest may appear' in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof: These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

"It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that, when that is done the insurer is called upon only to consider whether in case of loss it will honor such appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq. 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See also, the Bates case, infra. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties,

while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent 'where plain and unequivocal language is employed'.

"I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

"Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

"First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the 'as interest may appear' decisions, for that important phrase is entirely absent. Its wording is: 'Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy.'

"Secondly, there is not the slighest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

"Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is 'in the form of words in a printed rider regularly used by the insurance companies for covering and describ-

ing that kind of interest,' i. e., chattel mortgage interest.

"In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted stipulations which the majority considers it to qualify—these three factors and, absolutely nothing else."

The decision of the majority of the Circuit Court of Appeals in the instant case is therefore wholly without the support of precedent, and in fact is in direct conflict with the law as settled by this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33,

where, as in the case at bar, there was no attempt to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used, and where, as in the case at bar, there was no attempt to show what was in the record in the *Marshall* case (18 Fed. (2nd) 457), relied upon by the majority, namely, that the rider here used is "in the form of words in a printed rider ordinarily used by the insurance companies for covering and describing that kind of interest" that is, chattel mortgage interest.

The policy in the *Bates* case provided that if the property were sold the insurance ceased unless the insurer consented in writing, and it was held by this Court that an endorsement on the policy that the

policy was "payable in case of loss to E. C. Bates," followed by the insurer's endorsement that "consent is hereby given to the above endorsement," did not imply either knowledge or consent to a sale of the insured property. In that case the property had been sold to Bates, the appointee. In that case, as here, there was, as noted by Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or a usage and custom which qualified the language used, wherefore this Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the company that any loss sustained by Philbrick, covered by that policy, should be paid to Bates."

As to the *Bates* case the majority of the opinion of the Circuit Court of Appeals in the instant case says:

> "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

As stated by Judge Killetts in the dissenting opinion in the instant case (R. 243):

"In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the Bates case, 'the question becomes determinable upon implications arising from the indorsements (rider) alone."

POINT D-1.

If it be assumed, as asserted in the majority opinion of the Circuit Court of Appeals in the instant case (R. 227), that the absence from the loss-clause rider in the instant case of the words "as interest may appear" is immaterial, then the majority opinion in the instant case is, as it professes to be (R. 228), in square conflict with the unanswerable majority opinion of Judge Van Devanter in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

POINT E.

Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," but that, if insurance contracts, as here, "are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

The only clause in any form of loss-payable rider considered in any of the cases referred to in the majority and dissenting opinions of the Circuit Court of Appeals in the instant case which has been asserted by any Judge to be even potentially ambiguous is the clause "as interest may appear." Even the majority, in its opinion, in the instant case, does not venture to assert that the loss-clause rider here in question, from which the parties have deliberately eliminated the phrase "as interest may appear," is ambiguous or fairly susceptible, from its own language alone, of the construction that it is intended as a consent to the prohibited chattel-mortgage lien. On the contrary, the clear language is that "any loss under this policy *that may be proved due* shall be payable to the assured and the Cumberland Savings Bank Company, Cumberland, Ohio, *subject, nevertheless, to all the terms and conditions of the policy.*"

Because these insurance contracts are thus clear and unambiguous, they are "to be construed according to the sense and meaning used, and if they are clear and unambiguous, their terms to be taken and understood in their plain, ordinary and popular sense," as held by this Court in

Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther, 281 U. S. 34 (decided Feb. 24, 1930).

The rule that where the insurance contract is fairly susceptible of two different constructions, that one will

be adopted which is favorable to the insured, "ought not to be permitted to have the effect (as in the majority opinion in the case at bar) to make a plain agreement ambiguous and then to interpret it in favor of the insured."

Insurance Co. vs. McNulty, 157 Fed. (8 C. C. A.), 224, 226.

In the language of Judge Killits in his dissenting opinion in the instant case:

> "My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that 'resort cannot be had,' in a case such as here, to the rule respecting resolution of ambiguities, because there is here no 'double meaning' for that here the language used will not 'fairly and reasonably support that construction upon which liability of the insurer may be sustained.'"

POINT F.

The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with the rider's clear wording, upon a supposed custom or usage assumed by the court, and for which there is no foundation in the pleadings or in the evidence or in point of fact.

It is only where the possibly ambiguous phrase "as interest may appear" or other ambiguous language is employed in the loss-payable clause or policy, that a pleading and proof of a custom or usage that the phrase "as interest may appear" was understood to include a chattel-mortgage interest would be relevant to aid in a construction of the contract. In the absence of ambiguity and of such pleading and proof of custom or usage, the construction of the policy-and-loss clause must be "determinable upon the implications arising from the endorsements alone."

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Here the loss-clause rider contains no such phrase "as interest may appear."

Here there is no ambiguity of any kind.

Here there is no pleading or proof of custom or usage.

On the contrary, as said by Judge Killits in the instant case in his dissenting opinion:

> "In the instant cases there are none of the qualifications, such as are referred to in the

foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the *Bates case*, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.' "

Yet the majority Circuit Court of Appeals opinion, in the instant case, only achieves a holding that "the purpose in attaching them (the loss-payable-clause riders) was to grant authority to encumber the property by chattel mortgage"—

(1) By assuming an ambiguity which does not exist in the language, and

(2) By assuming a usage or custom that the loss-payable-clause rider, as here, phrased without the words "as interest may appear," was understood to permit chattel-mortgage encumbrance, though such assumed custom is neither pleaded, nor in proof, nor is in accordance with the actual facts.

POINT G.

The loss-payable rider was not a waiver of the prohibited encumbrance by chattel mortgage, because by its language it was not informative to the insurer of the existence of the inhibited lien, and knowledge of the insurer's agent may not be imputed to his principal under this form of policy, no actual knowledge by the insurer being otherwise shown.

The policy provision (hereinbefore quoted) in the instant case limiting the validity of waivers and modifications of the contract to such waivers as are en-

dorsed in writing upon the policy has frequently been construed by this Court.

Under that provision, an endorsement or rider claimed to work a waiver, as provided in that stipulation of the policy, must be so worded that the acceptance of it by the insurer should be regarded *as an agreement* to continue the contract in spite of the otherwise voiding presence of a mortgage lien; that is, that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgage.

The construction and effect of that provision was settled by this Court in

Insurance Co. vs. Grandview Building Assoc., 183 U. S. 361,

where it was held that the

> "limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture,* dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts,* ratified the action of the agent."

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

The doctrine of the Grandview Building Association case has been repeatedly reaffirmed by this Court.

Lumber Underwriters vs. Rife, 237 U. S. 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Co., 216 U. S. 311 (1910), Syl. and pp. 321, 322.

Mutual Life Insurance Co. vs. Hilton Green, 241 U. S. 613, 624 (1916).

Ætna Life Insurance Co. vs. Moore, 231 U. S. 543, 559 (1913).

Prudential Insurance Co. vs. Moore, 231 U. S. 560, Syl. 3 (1913).

The loss clause neither describes the payee as mortgagee, nor by words or intimation in any manner mentions chattel mortgage. The clause here, therefore, clearly is not informative to the insurer to the existence of the inhibited chattel mortgage, but performs an entirely different office well known to insurance practice, of appointing a person having no interest in the insured property to participate in the policy's proceeds.

Under the non-waiver clause of the insurance contract, knowledge by the insurer's agent of the prohibited chattel mortgage is not imputed to the insurer.

There is no proof whatever that the insurance company itself knew of the mortgage, or had the slightest hint that the bank was interested in the insured property in any way. Nor is there any proof, or even pleading, that it was intended by this phraseology of the loss-clause rider to convey such information to the insurer or to have the rider work a waiver of the defeasance clause in the contract.

In the face of these undisputed facts, and the entire lack of ambiguity in the contract, and in the face of this rule settled by this Court of non-imputation of the agent's knowledge, the majority of the Court of Appeals, in its opinion, holds that "the endorsements (loss-payable riders) were intended to authorize the encumbrance of the property by chattel mortgage", and bases that holding on the further assertion that "in this case it clearly appears that the endorsements were made with full knowledge of the facts".

In the unanswerable language of Judge Killits in the dissenting opinion (R. 244):

> "Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the

matter of what knowledge the insurers had of the purpose of the riders that counts."

POINT H.

Knowledge of the insurer's agent, Bracken, of the inhibited lien when he attached the rider, and his act in employing this form of rider, may not be imputed to his insurance company principal, for the additional reason that Bracken was acting in a dual incompatible agency for his bank principal on the one hand, and for his insurance company principal on the other.

It cannot be said in this case that the production and attachment of the closs-clause riders employed in this case by Bracken was the act of his insurance company principal, because of the incompatible duality of representative obligations of Bracken, cashier of the payee bank. These obligations were then wholly incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and correspondingly to the disadvantage of his insurance company principal. This incompatible duality makes it impossible to attribute to the insurer any act of his which favored either the bank, or the insured through the bank.

Mulrooney vs. Insurance Co., 163 Fed. 133, 135 (9 C. C. A.).

American Surety Co. vs. Pauly, 170 U. S. 133.

POINT I.

The great importance to the business world, the insuring public, and the insurance companies of an authoritative judicial determination of the legal effect of the loss-clause rider here employed calls for a review and final determination of this case by this Court, and particularly so in view of the direct conflict of opinion between various Courts of Appeals and the Judges of the Court of Appeals in the instant case.

It is of vital importance to the insuring public to be able, as security for indebtedness due from the insured, to designate a creditor who has no interest in the insured property as payee in case of fire loss, without thereby assuming the greatly increased premium expense properly chargeable to the materially increased hazard incident to a permitted encumbrance by chattel mortgage.

It is likewise of vital importance to the insurance companies to know whether, by use of the particular form of loss-clause rider here employed, the purpose thereof has been accomplished by permitting this highly desirable commercial transaction without thereby imposing upon the insurance company the material increase of hazard of chattel mortgage encumbrance. As this Court held in

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively

small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

POINT J.

The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of the loss, without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against encumbrance by chattel mortgage, did not waive its right to require performance by the insured of the condition requiring an award of appraisers fixing the amount of loss as a condition precedent to the insured's right of action on the policy.

The validity or interpetation of an insurance con-

tract—as distinguished from the question as to what constitutes waiver or modification thereof—is governed by state law.

Hartford Fire Ins. Co. vs. Nance, 12 Fed. (2d) 575, 576.

Carpenter vs. The Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 511, 512.

Ætna Insurance Co. vs. Moore, 231 U. S. 543.

Liverpool and Great Western Steam Co. vs. Phœnix Insurance Co., 129 U. S. 397, 443.

It is the settled Ohio rule of construction of the standard fire insurance policy here involved, binding on the Federal courts, that the condition of the insurance contract requiring the amount of loss to be fixed by a board of appraisers in the event of disagreement between the insured and the insurer as to the amount of loss, is a condition precedent, the performance of which is mandatory upon the insured before a cause of action against the insurer on the policy matures.

In *Graham vs. Insurance Co.,* 75 O. S. 374, it is held in the first syllabus (which is controlling in Ohio):

> "* * * such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss, except as such condition is modified as to a total loss (to real estate) by Section 3643, Revised Statutes; and in a suit to recover such a loss, in the absence of an award of appraisers,

and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown."

To the same effect is

Insurance Co. vs. Carnahan, 63 O. S. 258, Syllabus 5.

The majority of the Circuit Court of Appeals in its opinion disposes of the defense of plaintiff's failure to obtain an award of appraisers in the following language:

> "There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and the defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained."

The sole ground of the majority's holding that the plaintiff's failure to obtain an award of appraisers was not a bar to his recovery is thus the assumption of the majority that—

> "The defendants denied liability before suit was brought and after it was brought."

This is an assumption in direct conflict with the facts in the record.

An examination of the record will disclose that the question of liability or non-liability by the insurance company was never discussed, before suit was brought, between the plaintiff and defendant either orally or by writing. The only witness who testified as to any oral conversation with the adjuster of the company after the loss was the plaintiff himself, who testified that the conversation was under non-waiver agreement (Ex. 7, R. 141), and nowhere in his testimony does he claim or even intimate (R. 75, 78) that the adjuster of the insurance companies ever at any time denied liability. The only communication in writing from the insurance company to the plaintiff, appellee, prior to suit, was the letter of November 24, 1926, in which the insurance company set forth the respects in which the proofs of loss furnished by the insured did not conform to the requirements of the policy, and in which the company expressly disagreed with the plaintiff as to the amount of the loss. This letter appears as "Exhibits 19, 22 and 23" (R., pp. 198, 202, 203). On its face this letter shows that it does not contain or purport to contain any denial of liability.

As held in *Orenstein vs. Star Ins. Co. of America*, 10 Fed. (2d) 754:

> "Syl. 2. Insurer did not waive defense of increase of hazard by not denying liability on this account, when rejecting proofs of loss on the ground that they did not correctly state the loss; there being then no denial of liability on

any ground, and the rejecting being but an 'action taken' relative to the amount of loss, within the prior non-waiver agreement of the parties, expressly preserving insurer's rights and defenses from loss by waiver."

Page 757:

"'Defendants did not deny liability on the policy when rejecting the proofs of loss upon a different ground from that set up in the answer. *They did not deny liability at all. They simply rejected the proofs submitted, on the ground that they did not correctly state the loss.* This could not amount to a waiver because the rejection of the proofs of loss was an 'action taken' under the terms of the non-waiver agreement quoted above, which expressly preserved defendants' rights and defenses. * * *

"The execution of the non-waiver agreement was in itself notice that the defendants might assert defenses against the policies. The fact that the defendants did intend to assert such defenses could not possibly preclude them from insisting that any action taken under the non-waiver agreement be taken in accordance with the terms and provisions of the policies or from insisting on a forfeiture in case of a breach of its conditions."

This rule likewise prevails in the courts of Ohio, as held in *Edward Everett Co. vs. German American Ins. Co.*, 9 Ohio *Nisi Prius* (N. S.), 241 (affirmed 81 O. S., 573):

Syl. "A reply by an insurance company to a proof of loss, that it has reason to believe the

> cash value of the loss was much less and the salvage much more than claimed by the insured, *is not a denial of liability* by the company or a waiver of the provision of the policy for an appraisal, but amounts to a disagreement with the insured as to the amount of loss sustained and calls for an appraisal, and in a subsequent action on the policy it is not competent for the insured to give his reasons for not demanding an appraisal."

The Circuit Court of Appeals is therefore clearly in error in stating as the ground of its majority decision that "the defendants denied liability before suit was brought."

After suit was brought, the record shows that the only step taken by the defendant was to file its answer, in which the defendant, as permitted by the statutes of Ohio, set forth as many consistent defenses as it had, including the defense of plaintiff's failure to secure an award of appraisers, required as a condition precedent in the contract, and including also plaintiff's violation of the condition prohibiting incumbrance by chattel mortgage.

The Ohio statute in this connection, Ohio General Code 11315, is as follows:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer."

A denial of liability made after suit is brought, whether in a pleading or otherwise, could not induce the insured to believe that his performance of such condition precedent would be futile, because the commencement of the action fixes the rights of the parties as to performance or non-performance of such conditions precedent to the maturing of a cause of action.

The holding of the Circuit Court of Appeals majority on this point nullifies the statutory permission given a defendant under the statutes of Ohio to set up as many consistent defenses in his answer as he may have, and is in direct conflict with the law of Ohio as settled by the following decisions:

Insurance Company vs. Carnahan, 63 O. S. 258:

> Syl. 7. "Under Revised Statutes, Section 5071 (Gen. Code 11315), a defendant may set forth in his answer as many grounds of defense, counter-claim or set-off as he may have, provided that they are so far consistent that they can be verified by oath without swearing falsely; and within the limits of that section, an insurer may join in his answer a defense that the insured has not performed a condition precedent as to arbitration or appraisal of the amount of the loss, with other defenses which, if successfully maintained, would discharge the insurer from liability altogether."

To the same effect is

Fire Association vs. Agresta, 115 O. S. 426, 430.

The majority of the Circuit Court of Appeals therefore has committed clear and prejudicial error in dis-

posing of the appraisal defense on the erroneous assumption that "the defendants denied liability before suit was brought and *after it was* brought".

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that conflicts between decisions of various circuit courts of appeals, and between the decision of the majority of the Circuit Court of Appeals in the instant case and the decisions of this Court be avoided, and to that end that a writ of certiorari should be granted, and that this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and finally reverse said decision.

ROLLAND M. EDMONDS,
Counsel for Petitioner.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 30

THE HOME INSURANCE COMPANY OF NEW YORK,
PETITIONER,

vs.

J. M. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,703)

(35,703)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 30

THE HOME INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

J. M. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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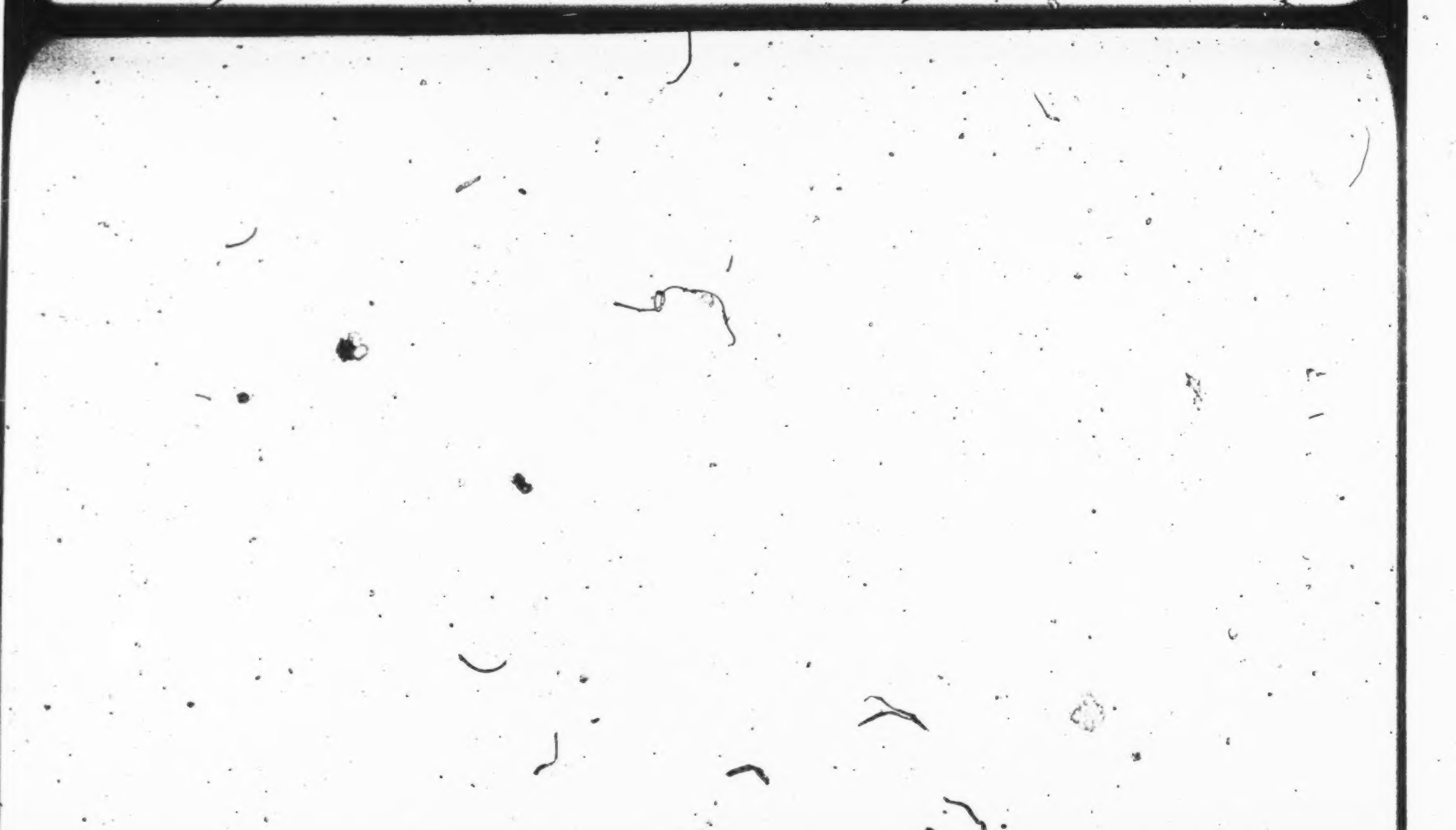

TRANSCRIPT OF RECORD

In the District Court of the United States, Southern District of Ohio, Eastern Division.

J. M. Scott, Plaintiff,

vs.

The Home Insurance Company of New York, Defendant.

No. 2560.

TRANSCRIPT ON REMOVAL—Filed February 24, 1927.

In the Common Pleas Court of Guernsey County, Ohio.

J. M. Scott, plaintiff, against The Home Insurance Company, New York, defendant.

Petition.

Defendant is a corporation, incorporated under the laws of the State of New York, and at all the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

On the 6th day of July, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, and at least one hundred and forty-four (144) wool bags, contained in the two story, slate roof, frame building, occupied as wool storage, situated on the west side of Cambridge Street, in the Village of Cumberland, County of Guernsey and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 6th day of July, 1926, in consideration of $101.60, annual premium, paid by plaintiff, defendant, by its policy of insurance No. 173, insured plaintiff against loss by fire to the amount of $8000.00, on said unwashed wool and on said wool sacks from the 6th day of July, 1926, at noon, to the 6th day of July, 1927, at noon.

Plaintiff says there was other concurrent insurance on

the aforesaid property as permitted under the terms of said policy in the sum of $20,000.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, all the aforesaid personal property was totally destroyed by fire.

On or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as next hereinafter stated, to wit: Said policy contained the following provisions as a part thereof, to wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

When said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the

policy. Attached to and forming part of Policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, Ohio, agency. Dated July 6th, 1926. J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay to plaintiff his loss as covered by said policy, or any part thereof, although requested so to do.

Wherefore, plaintiff prays judgment against defendant in the sum of $8000.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott,
By A. R. McCulloch,
W. W. Stewart and James Joyce,
His Attorneys.

[Duly verified.]

Precipe.

To the Clerk of Courts: Issue summons to the Sheriff of Guernsey County, for the defendant, returnable according to law. Endorse thereon, "Action for money only, amount claimed $8000.00, with interest from September 6th, 1926, and for costs of suit."

A. R. McCulloch,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

Summons.

The State of Ohio, Guernsey County, Common Pleas Court—To the Sheriff of Said County:

You are hereby commanded to notify The Home Insurance Company, New York, that they have been sued by J. M. Scott in the Court of Common Pleas of said Guernsey County, and must answer by the 29th day of January, A. D. 1927, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said Sheriff will make due return of this summons on the 10th day of January, 1927.

Witness my hand and the seal of said Court, this 30th day of December, 1926.

[Seal.] Thomas H. Snider, Clerk.

Transcript of Removal.

Sheriff's Return.

The State of Ohio, Guernsey County.

Received this Writ Dec. 30th, 1925, at 11 o'clock A. M. And on ....., 192.., I served the within named The Home Insurance Company, New York, by personally handing a true and certified copy of this writ with all the endorsements thereon to J. M. Bracken, agent of the Home Insurance Co., New York. There being no President or other chief officer of said corporation found within my County. Sheriff's Fees, $4.59.

Ed W. Wilson, Sheriff.
By Thos. E. Gracy, Deputy.

Notice of Petition and Bond for Order of Removal.

To A. R. McCulloch, W. W. Stewart and James Joyce, Attorneys for Plaintiff:

Please take notice that the defendant, The Home Insurance Company, will on Monday the 31st day of January, 1927, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of Ohio, Eastern Division, in accordance with the petition and bond of defendant, copies of which are hereto attached.

Dated 28th day of January, 1927.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

We acknowledge service upon us this 28th day of January, 1927, of the above notice, together with a copy of the petition and bond, for removal filed in the above case by the defendant, The Home Insurance Company.

A. R. McCulloch,
W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

Petition to Remove.

The petition of The Home Insurance Company, the above named defendant, respectfully shows to this court as follows:

That your petitioner is the defendant in the above entitled action;

That the above entitled action is brought by the plaintiff to recover of this defendant petitioner the sum of $8000.00 with interest from the 6th day of September, 1926, upon a policy of insurance issued by this defendant petitioner by reason of an alleged fire loss to property described in said policy;

That said action is wholly of a civil nature;

That the matter and the amount in dispute in said suit, exclusive of interest, exceed the sum of value of $3000.00, all of which will more fully appear in the petition in said action which is hereby referred to and made a part hereof;

That the controversy herein is between citizens of a state and of a foreign state;

That said defendant, The Home Insurance Company, is a foreign corporation and was at the time of the commencement of said suit and still is a non-resident and not a citizen of said State of Ohio; that the defendant, The Home Insurance Company, was then and still is a citizen and resident of the State of New York, having its principal place of business in the City of New York; and was then and still is a corporation duly formed, created and organized under and by virtue of the laws of the State of New York.

That said plaintiff, J. M. Scott, was at the time of the commencement of said suit and still is a citizen and resident of the State of Ohio and of the County of Guernsey of said State of Ohio, in the Southern District of Ohio, Eastern Division of said State.

That there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner and the plaintiff;

That the time within which this defendant is required by the laws of the State of Ohio to plead or answer herein has not yet expired and your petitioner has not yet appeared or answered or otherwise pleaded in this action;

That your petitioner herein presents a good and sufficient bond and surety as provided by the statute in such cases, conditioned that this petitioner will enter into such District Court for the Southern District of Ohio, Eastern Division, within thirty days from the filing of this petition, a certified copy of the record in this suit and for the payment of all costs which may be awarded by said Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make the offer of removal as required by law and to accept the bond presented here-

Transcript of Removal.

with, and direct a transcript of the record herein to be made to said Court as provided by law.

Scott & Scott,
Mooney, Bibbee & Edmonds,
Attorneys for Defendant, The Home Insurance Company.

[Duly verified.]

Bond of Removal.

Know All Men By These Presents that The Home Insurance Company, as principal, and The Great American Indemnity Company of New York, a corporation, as surety, are held and firmly bound unto the above named plaintiff, J. M. Scott, his Executors, Administrators and Assigns, jointly and severally, in the sum of Five Hundred Dollars ($500.00) for the payment of which well and truly to be made, we and each of us bind ourselves and our successors, jointly and severally by these presents.

The conditions of the above obligation are such that:

Whereas, the said The Home Insurance Company has applied by petition to the Court of Common Pleas of Guernsey County, Ohio, for the removal of a certain cause therein pending, wherein J. M. Scott is plaintiff and The Home Insurance Company is defendant, to the District Court of the United States for the Southern District of Ohio, Eastern Division, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Common Pleas Court be stayed.

Now, Therefore, if the said The Home Insurance Company shall enter into said District Court of the United States for the Southern District of Ohio, Eastern Division, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded therein by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

In Witness Whereof the said parties have caused their respective names to be subscribed hereto, this the 27th day of January, 1927.

The Home Insurance Company.
By R. M. Edmonds,
The Great American Indemnity Co. of New York.
By Frank J. Mockein,
[Seal.] Attorney in Fact.

Amended Petition.
Clerk's Certificate.

I, Thomas H. Snider, Clerk of the Court of Common Pleas within and for said County, and in whose custody the files, journals, and records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing—

Petition and Precipe, filed 12-29-26

Summons issued, 12-30-26

General Continuance of Oct. Term, 1926, Jour. 49, P. 355

Summons returned and filed, 1-8-27

Petition, Bond for Removal, Notice and Acknowledgment of Service, filed 1-29-27

Journal Entry under date of January 31, 1927, as follows: "Application for order of removal to Federal Court is hereby sustained and granted"

Cost Bill, filed 2-11-27

are taken and copied from the original now on file in said Court, that the foregoing have been compared by me with said original documents and that the same are true and correct copies thereof.

In Testimony Whereof, I hereunto subscribe my name officially and affix the seal of said Court, at the Courthouse, in Cambridge, Ohio, in said County, this 11th day of February, A. D. 1927.

Thomas H. Snider,
Clerk of Said Common Pleas Court.
By Stella Bliss Wheeler,
Deputy.

AMENDED PETITION—Filed October 13, 1927.

Defendant is a corporation, incorporated under the laws of the State of New York, and at all the times hereinafter mentioned, was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio,

through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

On the 6th day of July, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, of the worth and value of $28,700.00, and at least one hundred and forty-four (144) wool bags, of the worth and value of $57.60, all of the value of $28,757.60, contained in the two story, slate roof, frame building, occupied as a wool storage building, situated on the west side of Cambridge Street, in the Village of Cumberland, Guernsey County, and State of Ohio, and occupied by assured during said time as a wool storage building.

On the 6th day of July, 1926, in consideration of $101.60, annual premium, paid by plaintiff, defendant, by its policy of insurance No. 173, insured plaintiff against loss by fire to the amount of $8000.00 on said unwashed wool and on said wool sacks from the 6th day of July, 1926, at noon, to the 6th day of July, 1927, at noon.

Plaintiff says there was other concurrent insurance on the aforesaid property, as permitted under the terms of said policy in the sum of $20,000.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, and while the aforesaid personal property was located in the aforesaid building hereinbefore described, and while said personal property consisted of the amount and was of the value hereinbefore stated, all of the aforesaid personal property was totally destroyed by fire, to plaintiff's damage in the sum of $28,757.60.

On or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant, plaintiff furnished and delivered to defendant true copies of all insurance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days

prior to the bringing of this action, except as next hereinafter stated, to wit: Said policy contained the following provision as a part thereof, to wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

When said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company, of Cumberland, Ohio, on or about the 19th day of June, 1926, and defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "loss payable clause" in the following words and figures, to wit: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of policy No. 173 of the Home Insurance Co., New York, issued at the Cumberland, Ohio, agency. Dated July 6th, 1926. J. M. Bracken, Agent."

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "loss payable clause" on said policy of insurance is attached thereto.

Defendant has failed and refused to pay plaintiff his loss, as covered by said policy, or any part thereof, for such damages, so sustained by plaintiff, by reason of the destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant by reason of the premises herein, the sum of $8000.00, with interest thereon from the 6th day of September, 1926.

Answer to Amended Petition.

Wherefore, plaintiff prays judgment against defendant in the sum of $8000.00, with interest thereon from the 6th day of September, 1926, and for costs of suit.

J. M. Scott.

By W. W. Stewart,
A. R. McCulloch,
Elwood Murphy and
James Joyce,
His Attorneys.

[Duly verified.]

ANSWER TO AMENDED PETITION—Filed November 12, 1927.

First Defense:

Now comes the defendant, The Home Insurance Company, and for its first defense to plaintiff's amended petition admits that this defendant is a corporation duly incorporated under the laws of the State of New York, and at all times mentioned in the amended petition was duly authorized to issue insurance against loss by fire in Guernsey, Ohio.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the amended petition and denies that said wool and wool bags and each of them referred to in the amended petition contained in said frame building referred to in said amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seventy Thousand pounds of unwashed wool or was of the quantity of One Hundred and Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said wool bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the amended petition on the 6th day of September, 1926, was very much

less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

This defendant denies that by said policy referred to in the amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary, this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges tha said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or not or by solvent or insolvent insurers covering such property.

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Answer to Amended Petition.

This defendant denies that on September 6, 1926, said personal property referred to in the amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the amended petition, and denies that said personal property referred to in the amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the amended petition either on the 6th day of September, or at any other time, in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the defendant the pounds of said unwashed wool and the number of said wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed all or any of the conditions of said policy on plaintiff's part to be performed more than sixty days prior to the bringing of this action, or at any other time.

This defendant admits that said policy of insurance contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

This defendant admits that the plaintiff did not perform or comply with the said provisions contained in said policy last hereinbefore quoted. This defendant denies that any other agreement than that contained in said policy of insurance was ever made between this

defendant and the plaintiff. This defendant admits that before said policy was made and delivered to plaintiff a chattel mortgage on a part of the aforesaid personal property referred to and described in the amended petition and described in said policy of insurance was executed and delivered by the plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execution and delivery of said chattel mortgage, or at any time thereafter up until long after said fire, this defendant knew or had any knowledge whatever that said aforesaid personal property was encumbered by chattel mortgage, or that the plaintiff's ownership of said personal property was subject to said chattel mortgage.

This defendant denies that plaintiff's ownership to said personal property or any part thereof was sole and unconditional as to any or all of said personal property.

This defendant admits that there was attached to said policy of insurance and made a part thereof a loss payable clause in the following words and figures, to-wit:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, Ohio, agency. Dated July 6, 1926."

This defendant denies that the plaintiff is or has ever been excused or relieved in any manner whatsoever or in any respect whatsoever by defendant concerning any matters and things, or any part thereof, including the performance of the conditions of said policy alleged in the amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained, among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept. 6, 1926, to property located at in rear lot — W/S of Cambridge St., Cumberland, Ohio, and in investigating the

cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement."

"Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

"The sole object and intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto."

This defendant denies each and every allegation and averment in plaintiff's amended petition contained which is not herein expressly or specifically admitted or denied.

Second Defense:

This defendant for its second defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage; forthwith separate the damaged and undamaged personal property, put it

in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties

thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This defendant alleges that the plaintiff utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy.

This defendant alleges that the plaintiff utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy. This defendant alleges that the plaintiff utterly failed within sixty days after said fire, as required by the above quoted conditions contained in said policy, and at all other times to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the above quoted conditions contained in said policy; that the plaintiff utterly failed within sixty days after said fire and at all other times to make and render to this defendant due proofs of said loss, as required by the above quoted conditions contained in said policy.

This defendant alleges that subsequent to said fire the plaintiff and this defendant disagreed as to the amount of loss caused by said fire to this property described in said policy; that the amount of loss caused by said fire

to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Third Defense:

This defendant for its third defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described in said policy was not truly stated in said policy.

This defendant alleges that at the time of the delivery and acceptance of said policy of insurance and at all times thereafter up until and including the time of said fire the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership and was not truly stated in said policy; that at each and all of said times a person, firm or corporation other than the plaintiff had title to or an interest in said property or a part thereof described in said policy; that at the time of the delivery and acceptance of said policy of insurance and at all times thereafter up until and including the time of said fire said personal property or a part thereof, which was the subject of insurance described in said policy was incumbered by a chattel mortgage which remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title to or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof,

which was the subject of insurance described in said policy be or become incumbered by a chattel mortgage, or in any manner altering any of the above quoted conditions contained in said policy.

Fourth Defense:

This defendant for its fourth defense to plaintiff's amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its fourth defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

This defendant alleges that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to this defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored; whereas in truth and fact, as the plaintiff then well knew, said fire did not originate by lightning striking said building.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact, as the plaintiff then well knew, another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to or an interest in said wool or a part thereof located in said building at the time of said fire.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least Seventy Thousand Pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed

by said fire; that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact, as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand Pounds, and whereas, in truth and fact, as the plaintiff then well knew, the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said fire plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact, as the plaintiff then well knew, many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew, an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to the defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore this defendant prays that it may be dismissed from this action with a judgment for its costs herein expended.

Scott & Scott,
Cambridge, Ohio,
Mooney, Bibbee & Edmonds,
Columbus, Ohio,
Attorneys for Defendant.

[Duly verified.]

SECOND AMENDED PETITION—Filed January 2, 1928.

Plaintiff, having first received leave of court to file this, his second amended petition, says that the defendant is a corporation, incorporated under the laws of the State of New York, and at all times hereinafter mentioned, was duly authorized to issue insurance against loss of fire in Guernsey County, Ohio, through J. M. Bracken, an agent, at Cumberland, Guernsey County, Ohio, duly appointed by defendant for such purposes.

That on the 6th day of July, 1926, and ever since, and until after the 6th day of September, 1926, plaintiff was the sole and unconditional owner, except as hereinafter alleged, of the following personal property, to wit, wool and wool bags, consisting of at least seventy thousand (70,000) pounds of unwashed wool, of the worth and value of $28,700.00 and at least one hundred and forty-four (144) wool bags, of the worth and value of $57.60, all of the value of $28,757.60, contained in the two story, slate roof, frame building, occupied as a wool storage building, situated on the west side of Cambridge Street, in the Village of Cumberland, Guernsey County, and State of Ohio, and occupied by assured during said time as a wool storage building.

That on the 6th day of July, 1926, in consideration of $101.60 annual premium, paid by plaintiff, the defendant, by its policy of insurance No. 173, insured plaintiff against loss by fire to the amount of $8000.00, on said unwashed wool and on said wool sacks from the 6th day of July, 1926, at noon, to the 6th day of July, 1927, at noon.

Plaintiff says there was other concurrent insurance on the aforesaid property, as permitted under the terms of said policy in the sum of $20,000.00.

On said 6th day of September, 1926, while said policy of insurance was in full force, and while the aforesaid personal property was located in the aforesaid building hereinbefore described, and while said personal property consisted of the amount and was of the value hereinbefore stated, all of the aforesaid personal property was totally destroyed by fire, to plaintiff's damage in the sum of $28,757.60.

That on or about the 6th day of September, 1926, and immediately after said loss by fire, plaintiff notified the defendant thereof and on said day and within sixty days after said fire, filed his proof of loss in writing, signed and sworn to by plaintiff, and rendered the same to defendant, and at the request of defendant plaintiff furnished and delivered to defendant true copies of all

surance policies held by him on said personal property, and furnished and delivered to defendant the pounds of said unwashed wool and the number of said wool sacks so consumed by said fire.

Plaintiff has performed all the conditions of said policy on his part to be performed more than sixty days prior to the bringing of this action, except as hereinafter stated to wit:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be * * * personal property and be or become incumbered by a chattel mortgage."

When said agreement was entered into and said policy made and delivered to plaintiff, a chattel mortgage on a part of the aforesaid personal property was executed and delivered by plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, on or about the 19th day of June, 1926, and defendant well knew that the aforesaid personal property was incumbered by said chattel mortgage, as aforesaid, and that plaintiff's ownership of said personal property was subject to said chattel mortgage.

Plaintiff's ownership was sole and unconditional as to all of said insured personal property, unless such ownership was otherwise because of the facts alleged, as aforesaid.

Defendant attached to said insurance policy a "Loss Payable Clause" in the following words and figures, to wit:

Loss Payable Clause.

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, Ohio, Agency. Dated July 6th, 1926. J. M. Bracken, Agent.

By reason whereof, plaintiff is and always has been excused and relieved by defendant in all respects concerning such matters and things, and every part thereof, including the performance of the conditions of said policy herein set forth.

A copy of said "Loss Payable Clause" on said policy of insurance is as follows:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire."

"* * * and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

Plaintiff further says that he has not asked for an appraisement for the following reasons:

That on or about the 15th day of September, 1926, the defendant, through its adjuster, to wit, A. C. Harrod, being the agent in charge of said loss under said policy, said to the plaintiff, and notified the plaintiff, that said property destroyed by fire was a total loss, and that there was no property to appraise.

Plaintiff further alleges that the defendant never made any demand or any requirement for an appraisement of said loss of the property.

Plaintiff further alleges that the defendant, at no time, named an appraiser for the defendant, or requested an appraisement to be made or an appraiser to be appointed by the plaintiff, by reason of the provisions of said policy or otherwise.

Plaintiff further says that the defendant, through its said adjuster, wholly waived any appraisement of said total loss and waived the selection of an appraiser, by the following demands, requirements and contract with the plaintiff, to wit:

That after the said plaintiff had exhibited to the adjuster the destroyed premises, and given a full statement of the amount of the contents of the said wool barn, and the prices and quantity of wool that had been then and there destroyed by said fire, the said adjuster made the following proposition to plaintiff, to wit:

"All the additional proof I will require of you, is for you to procure for the defendant company an itemized statement of the amount of pounds of wool and the dates

of the sales of the same and by whom sold to you, and that will be sufficient. That if said list of farmers and wool growers and said sales to you amounted to seventy thousand pounds of wool, or more, (being the same amount that the plaintiff was claiming or claimed as a total loss), that he, the said adjuster, would at once check up such list of farmers and wool growers for said defendant company on his return to plaintiff's residence at Cumberland, Ohio, where said fire took place, and if said list would show a loss, as claimed by plaintiff, that it would be satisfactory to the defendant company for proof of loss, and there would be no further trouble about the adjustment of the loss to plaintiff, under said policy, and that the defendant company would at once pay the same."

Said adjuster further stated to plaintiff, then and there, that while plaintiff was procuring said data, so requested, that the plaintiff would get the usual letter from the defendant company, and that he, said adjuster, would come back after plaintiff had received such usual letter and check up such list, and further represented to plaintiff that this would be all plaintiff had to do.

Plaintiff thereupon explained to said adjuster, so representing the defendant company, that many of such farmers and wool growers lived far from Cumberland, Ohio, and in several counties, and the books and records of such sales, including the addresses of said farmers, were in the office located in the building which was then and there burned. Plaintiff further explained to the said adjuster that it would require the help of his son who had knowledge of these farmers and wool growers and who knew of their addresses and perhaps with the help of others, he could make out such a list by calling directly upon such farmers and wool growers. Thereupon the said adjuster insisted upon plaintiff going to said expense and to spending his time and the time of his son, in making this particular kind of proof for the benefit of said defendant company.

Plaintiff further says that by reason of the great number of such vendors and distance of said vendors, from Cumberland, Ohio, and owing to the conditions of the roads, it required upwards of forty days of time and expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

Plaintiff further says that at the end of said period, he had complied with the request and demand of the defendant company by making said calls and procuring

the individual signatures to said schedules of all of said amounts and sales, which totalled in excess of the amount of wool established by the proof and loss theretofore made to said adjuster, and which was in full compliance with the request and demand of said defendant company.

Plaintiff further says that he expended in time and money in so procuring the aforesaid data, as requested by the defendant, more than $200.00, the exact amount plaintiff is unable to definitely state; that plaintiff fully completed the work of so securing the names of said persons and the signatures, together with the amount of wool so sold and delivered to him and so burned as speedily as was possible to accomplish the same, and at as reasonable an expense as the same could be performed.

Plaintiff further says that he has had in his possession all the aforesaid information at Cumberland, Ohio, in accordance with his agreement, and has ever been ready to submit the same to the adjuster for his verification and to check up the same, as was then and there and theretofore agreed to be done by him.

Plaintiff is still ready and willing to do so, notwithstanding the defendant company has failed and refused to call for said information or accept the same as it had then and there agreed to do.

Defendant, after plaintiff complied with the defendant's aforesaid request, wholly failed to call for the list of the names of the farmers and wool growers so individually signed by the farmers and wool growers and wholly failed to call for said schedule of sales, as was agreed to, and has ever since refused payment of said loss, both before and after suit was filed.

Defendant is therefore estopped to claim any other or different proofs or appraisement other than the aforesaid contract or requirement, fully complied with on the part of said plaintiff.

Defendant well knew that plaintiff was collecting said data and expending said money, and permitted plaintiff to be tolled along, believing and knowing that plaintiff was then and there relying upon said request and acting thereon in good faith, when it requested additional proof of loss, and the amount thereof in this form.

Plaintiff further says, on the faith of said premises, he performed all of said services and expended said money, as aforesaid, and not otherwise.

By reason whereof, the defendant has wholly waived the conditions of said policy requiring any other addi-

tional proof of loss from plaintiff and waived any other requirement of appraisement or any other condition on said policy.

Plaintiff further says that he is and ever has been excused and relieved from furnishing further proof in all respects touching or relative to said matters and things, required in said policy in respects to said appraisement or any further proof of loss, including any other or further conditions of said policy in establishing or agreeing to establish the quantity of wool so destroyed by fire.

That said defendant is therefore wholly estopped from requiring or demanding of said plaintiff any further appraisement or proof of loss of said wool.

Defendant has failed and refused to pay plaintiff his loss, as covered by said policy, or any part thereof, for such damages, so sustained by plaintiff, by reason of the destruction of said personal property by fire, although requested so to do, and there is due plaintiff from defendant by reason of the premises herein, the sum of $8000.00 with interest thereon from the 6th day of September, 1926.

Wherefore plaintiff prays judgment against defendant in the sum of $8000.00 with interest thereon from the 6th day of September, 1926, and for costs of suit.

W. W. Stewart and
James Joyce,
Attorneys for Plaintiff.

[Duly verified.]

ANSWER TO SECOND AMENDED PETITION—Filed February 25, 1928.

First Defense:

Now comes the defendant, The Home Insurance Company, and for its first defense to plaintiff's second amended petition admits that this defendant is a corporation duly incorporated under the laws of the State

of New York, and at all times mentioned in the second amended petition was duly authorized to issue insurance against loss by fire in Guernsey County, Ohio.

This defendant denies that on September 6, 1926, or at any time prior thereto, the plaintiff was the sole and unconditional owner of said property referred to in the second amended petition and denies that said wool and wool bags and each of them referred to in the second amended petition contained in said frame building referred to in said second amended petition on the said 6th day of September, 1926, and at the time of said fire was of the quantity of Seventy Thousand pounds of unwashed wool or was of the quantity of One Hundred and Forty-four wool bags, or that said wool was of the value of $28,700.00 or that said wool bags was of the value of $57.60. On the contrary, this defendant alleges that the quantity of wool, if any, in said frame building referred to in the second amended petition on the 6th day of September, 1926, was very much less than Seventy Thousand pounds and that the value of said wool and bags at said time and place was very much less than said sum of $28,757.60.

This defendant denies that by said policy referred to in the second amended petition, or otherwise, this defendant unconditionally insured the plaintiff or anyone else against loss by fire to any property whatsoever or in any amount whatsoever. On the contrary this defendant alleges that by said policy of this defendant this defendant agreed, subject nevertheless to and in consideration of all the terms, stipulations and conditions contained in said policy to insure the person named in said policy as the insured against direct loss or damage by fire to the property described in said policy, in an amount not exceeding the amount therein specified and for the term therein stated.

This defendant admits and alleges that at the time of said fire referred to in the second amended petition there was other concurrent insurance issued by insurance companies other than this defendant to the plaintiff covering upon said property described in said policy of this defendant in the sum of $22,250.00.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance whether valid or

or by solvent or insolvent insurers covering such property.

"This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

This defendant denies that on September 6, 1926, said personal property referred to in the amended petition was located in said building described in said policy of this defendant, and denies that such wool as there was in said building described in said policy of this defendant on the 6th day of September, 1926, was of the amount or was of the value as stated in the second amended petition, and denies that said personal property referred to in the second amended petition was totally destroyed by fire either on the 6th day of September, 1926, or at any time, and denies that the plaintiff suffered loss or damage to said property described in the second amended petition either on the 6th day of September, or at any other time, in the amount of $28,757.60.

This defendant denies that on the 6th day of September, 1926, or immediately after said alleged loss by fire, the plaintiff notified the defendant of said loss, as required by the terms and conditions of said policy of insurance. This defendant denies that within sixty days after said fire or at any other time the plaintiff filed his proof of loss in writing, signed and sworn to by the plaintiff, or rendered the same to this defendant, in accordance with the requirements and conditions of this company's said policy of insurance, and denies that at the request of the defendant the plaintiff furnished or delivered to the defendant true copies of all insurance policies held by the plaintiff on said personal property or that the plaintiff furnished and delivered to the de-

fendant the pounds of said unwashed wool and the number of said wool sacks so claimed to have been consumed by said fire.

This defendant denies that the plaintiff has performed all or any of the conditions of said policy on plaintiff's part to be performed more than sixty days prior to the bringing of this action, or at any other time.

This defendant admits that said policy of insurance contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

This defendant admits that the plaintiff did not perform or comply with the said provisions contained in said policy last hereinbefore quoted. This defendant denies that any other agreement than that contained in said policy of insurance was ever made between this defendant and the plaintiff. This defendant admits that before said policy was made and delivered to plaintiff a chattel mortgage on a part of the aforesaid personal property referred to and described in the second amended petition and described in said policy of insurance was executed and delivered by the plaintiff to The Cumberland Savings Bank Company of Cumberland, Ohio, to-wit, on or about the 19th day of June, 1926.

This defendant denies that at the time of the execution and delivery of said chattel mortgage, or at any time thereafter up until long after said fire, this defendant knew or had any knowledge whatever that said aforesaid personal property was encumbered by chattel mortgage, or that the plaintiff's ownership of said personal property was subject to said chattel-mortgage.

This defendant denies that plaintiff's ownership to said personal property or any part thereof was sole and unconditional as to any or all of said personal property.

This defendant admits that there was attached to said policy of insurance and made a part thereof a loss payable clause in the following words and figures, to-wit:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 173 of the Home Insurance Company, New York, issued at

its Cumberland, Ohio, agency. Dated July 6th, 1926."

This defendant denies that the plaintiff is or has ever been excused or relieved in any manner whatsoever or in any respect whatsoever by defendant concerning any matters and things, or any part thereof, including the performance of the conditions of said policy alleged in the second amended petition.

This defendant admits that it has paid nothing to the plaintiff under any policy of insurance.

This defendant admits that the plaintiff has not asked for an appraisement of the amount of said loss.

This defendant denies that this defendant ever through any adjuster, or through one A. C. Harrod, or through any agent in charge of said loss under said policy, or otherwise, at any time said to the plaintiff, or notified the plaintiff that said property claimed to have been destroyed by fire was a total loss, or that there was no property to appraise.

This defendant denies that this defendant never made any requirement for an appraisement of said loss to said property.

This defendant denies that this defendant through said alleged adjuster, or otherwise, wholly waived, or waived at all or is estopped to insist upon any appraisement of said loss, or waived the selection of an appraiser, either by said alleged demands, alleged requirements, or alleged contracts referred to in the second amended petition, or otherwise.

This defendant denies that the plaintiff ever at any time exhibited to this defendant, or its adjuster, said destroyed or damaged premises, or ever at any time gave a full statement of the amount of the contents of said barn, or of the prices, or of the quantity of wool that had been, or were damaged or destroyed by said fire, and denies that said alleged adjuster, or any adjuster of the defendant, made said alleged proposition to the plaintiff set forth in said second amended petition, or stated to the plaintiff that all any adjuster would require of plaintiff was to procure for the defendant company an itemized statement of the amount of pounds of wool and of the dates of sale of same, and by whom sold to the plaintiff, or ever at any time stated that such itemized statement would be sufficient.

This defendant denies that this defendant through any adjuster, or otherwise, ever at any time stated to the plaintiff that if said list of farmers and wool growers and said sales to plaintiff amounted to Seventy Thou-

sand pounds of wool, or more, that any adjuster of this defendant would at once check up such list of farmers and wool growers for said defendant company on his return to plaintiff's residence at Cumberland, Ohio, or that he would return at all to plaintiff's residence at Cumberland, Ohio, or that if said list would show a loss as claimed by plaintiff that it would be satisfactory to the defendant company for proof of loss, or that there would be no further trouble about the adjustment of the loss to plaintiff under said policy, or that the defendant company would at once pay the same, and denies that this defendant ever, through any adjuster, or otherwise, made any of said statements in substance or form as alleged in the second amended petition.

This defendant denies that said alleged adjuster, or this defendant, stated to the plaintiff then and there, or at any other time, that while plaintiff was procuring said data so requested that the plaintiff would get the usual letter from the defendant company, or any letter from the defendant company; or that said alleged adjuster would come back after the plaintiff had received such usual letter, or any letter, and check up such list, or ever at any time represented to the plaintiff that this would be all that the plaintiff had to do.

This defendant denies that the plaintiff thereupon, or at any time, explained to said alleged adjuster that many of said farmers and wool growers lived far from Cumberland, Ohio, or in several counties.

This defendant denies that the plaintiff explained to any adjuster of this defendant that it would require the help of plaintiff's son, or perhaps the help of others, to make out said alleged list by calling directly upon said farmers or wool growers, and denies that any adjuster of this defendant insisted upon plaintiff going to any expense or spending plaintiff's time or that of his son in making said particular alleged form of proof either for the benefit of the defendant, or otherwise.

The defendant denies that it required upwards of forty days of time or expense to call upon all of said wool vendors to get the quantities and persons and dates of said sales.

This defendant denies that at the end of said period, or at any time, the plaintiff complied with any request or demand of the defendant, or procured or made said calls and procured the individual signatures to said alleged schedule of all of said alleged amounts and sales, with the knowledge of the defendant, or otherwise, and

denies that said alleged schedule totalled in excess of the amount of wool set forth in any proof of loss theretofore made to any adjuster of this defendant, and denies that any alleged schedule was in full compliance with any request or demand of this defendant company.

This defendant denies that plaintiff expended the sum of $200.00 in procuring said alleged data. Defendant denies that the plaintiff completed the work if any of securing the names of said persons and said signatures, together with the amount of wool so sold and delivered to the plaintiff and claimed to have been burned as speedily as possible to accomplish same.

This defendant denies that the plaintiff has had in his possession said alleged information at Cumberland, Ohio, in accordance with any agreement, or otherwise, or that the plaintiff has ever been ready, or at any time ready, to submit the same to any adjuster of this defendant, and denies that this defendant has ever at any time agreed to call for, or accept, said alleged information.

This defendant alleges that subsequent to said fire, to-wit, on or about the 15th day of September, 1926, the plaintiff and this defendant entered into a written non-waiver agreement, which contained among others, the following express stipulations and agreements:

"It Is Hereby Mutually Stipulated and Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept. 6, 1926, to property located at in rear lot — W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement."

"Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

"The Sole object and intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto."

This defendant denies that this defendant ever knew

that the plaintiff was collecting any data or expending any money, and denies that this defendant permitted the plaintiff to be tolled along, or that the defendant believed or knew that the plaintiff was relying upon any request or acting thereon in good faith, and denies that on the faith of any promises plaintiff performed any services or expended any money, or that the defendant has waived the conditions of said policy requiring any other additional proofs of loss from the plaintiff, or that the defendant has waived any other requirement of appraisement or other conditions of said policy, or that the defendant is estopped to assert any condition of said policy.

This defendant denies each and every allegation and averment in plaintiff's second amended petition contained which is not herein expressly or specifically admitted or denied.

Second Defense:

This defendant for its second defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its second defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days

after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; and changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

Answer to Second Amended Petition.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This defendant alleges that the plaintiff utterly failed to give immediate notice in writing of said alleged loss to this defendant company, as required by the above quoted conditions contained in said policy.

This defendant alleges that the plaintiff utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy. This defendant alleges that the plaintiff utterly failed within sixty days after said fire, as required by the above quoted conditions contained in said policy, and at all other times, to render a statement to this defendant company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and the other matters of information required by the above quoted conditions contained in said policy; that the plaintiff utterly failed within sixty days after said fire and at all other times to make and render to this defendant due proofs of said loss, as required by the above quoted conditions contained in said policy.

This defendant alleges that subsequent to said fire the plaintiff and this defendant disagreed as to the amount of loss caused by said fire to this property described in said policy; that the amount of loss caused by said fire to said property described in said policy has never at any time been ascertained by appraisers, as required by the above quoted conditions contained in said policy.

Answer to Second Amended Petition.

Third Defense:

This defendant for its third defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its third defense, as fully as if the same were herein written.

This defense alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein.

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property or be or become incumbered by a chattel mortgage."

This defendant alleges that the interest, if any, of the plaintiff in said property or a part thereof described in said policy was not truly stated in said policy.

This defendant alleges that at the time of the delivery and acceptance of said policy of insurance and at all times thereafter up until and including the time of said fire the interest, if any, of the plaintiff in said property or a part thereof described in said policy was other than unconditional and sole ownership and was not truly stated in said policy; that at each and all of said times a person, firm or corporation other than the plaintiff had title to or an interest in said property or a part thereof described in said policy; that at the time of the delivery and acceptance of said policy of insurance and at all times thereafter up until and including the time of said fire said personal property or a part thereof, which was the subject of insurance described in said policy was incumbered by a chattel mortgage which remained in full force and effect from the date of execution and delivery thereof up until and including the time of said fire; that no agreement was ever at any time endorsed upon or added to said policy consenting that the interest of the plaintiff in said property or any part thereof be other than unconditional and sole ownership or consenting that any person, firm or corporation other than the plaintiff have title or or any interest in said property or any part thereof described in said policy, or consenting that said personal property or any part thereof, which was the subject of insurance described in said policy be or become incumbered by a chattel mortgage, or in any

manner altering any of the above quoted conditions contained in said policy.

Fourth Defense:

This defenant for its fourth defense to plaintiff's second amended petition makes each and all of the admissions, averments and denials contained in its first defense a part of this, its fourth defense, as fully as if the same were herein written.

This defendant alleges that said policy of insurance contained the following provisions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

This defendant alleges that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to this defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored; whereas in truth and fact, as the plaintiff then well knew said fire did not originate by lightning striking said building.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact as the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio had title to or an interest in said wool or a part thereof located in said building at the time of said fire.

This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least Seventy Thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire; that the actual cash value of said wool described in said policy at and just prior to the time of said fire

and the loss and damage thereto caused by said fire were each the sum of $28,700.00; whereas in truth and fact as the plaintiff then well knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed Twelve Thousand pounds, and whereas, in truth and fact as the plaintiff then well knew the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of Four Thousand Dollars.

This defendant alleges that subsequent to said fire plaintiff further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging to and in the possession of the plaintiff at the time of said fire, and that no attempt to deceive this defendant company as to the extent of said loss had in any manner been made; whereas, in truth and fact as the plaintiff then well knew many articles were mentioned in said sworn statement which were not in said building damaged or destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire, and whereas in truth and fact, as the plaintiff well knew an attempt to deceive this defendant company as to the extent of said loss had been and was then and thereby being made by the plaintiff.

This defendant alleges that said false and fraudulent statements and each thereof were made by the plaintiff to the defendant as aforesaid with the purpose and intent on the part of the plaintiff of thereby deceiving and defrauding this defendant.

Wherefore, this defendant prays that it may be dismissed from this action with a judgment for its costs herein expended.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified,]

REPLY—Filed March 10, 1928.

Now comes the plaintiff, J. M. Scott, and for reply to the answer of the defendant to plaintiff's second amended petition admits that he signed a certain paper writing subsequent to said alleged fire, to wit, on or about the 15th day of September, 1926, but denies that the same is in anywise a non-waiver agreement; that there was no consideration whatever for said agreement, and that the said non-waiver proposition, for whatever purposes it was signed, was immediately waived and avoided by the subsequent conduct of the Company as set forth in the second amended petition by requiring plaintiff to procure the written statements of the vendors of wool that furnished the proof or intended to prove the amount of wool in said building consumed, and as the same is more fully set forth in plaintiff's second amended petition herein filed, which is hereby adopted, as a complete waiver to this alleged condition subsequent claimed in said non-waiver agreement.

For further reply, the plaintiff denies that he utterly failed to give immediate notice in writing of said alleged loss to this defendant Comuany, as required by the above quoted conditions contained in said policy, and further alleges that plaintiff did give immediate notice of said alleged loss to the defendant Company, which notice was then and there accepted by the defendant Company, and acted upon by the defendant Company, and it appeared and investigated the entire subject matter of the loss and made an estimate thereof in response to said notice of said destroyed property.

Plaintiff further denies that he utterly failed to make a complete inventory of said damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, as required by the above quoted conditions contained in said policy and set forth in defendant's answer.

Plaintiff denies that he utterly failed within sixty days after said fire, as required by the quoted conditions contained in said policy and set forth in said answer, and at all other times, to render a statement to this defendant Company, signed and sworn to by the plaintiff, stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured, and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether valid or not covering any of said property, and

the other matters of information required by the quoted conditions contained in said policy.

Plaintiff further denies that he utterly failed within sixty days after said fire and at all other times to make and render to said defendant due proofs of said loss, as required by the quoted conditions contained in said policy, but alleges that he complied with all of the requirements of said policy and that the said defendant Company is estopped and barred from requiring any other or different proof or proofs either as to the value or quantity of property so destroyed by fire, for the reason that said defendant Company required plaintiff to procure a list and quantity and the value thereof from all of said vendors of wool, with an agreement, that the said list would be fully satisfactory to the defandant and would be sufficient and would comply with the said terms of the policy, and the plaintiff in compliance with the said request prepared the statement made by the vendors for said defendant Company, and has at all times held the same subject to their call and investigation as per agreement with said defendant Company, as more fully set forth in plaintiff's second amended petition.

Plaintiff further denies that subsequent to said fire the plaintiff and the defendant ever disagreed as to the amount of loss caused by said fire to the property described in said policy or subsequently furnished to said defendant Company, as aforesaid; admits that the amount of loss caused by said fire has never, at any time, been ascertained by appraisers, but that the said appraisement was waived and that further appraisement to ascertain the value was waived by requiring plaintiff to furnish an itemized list of the amount and value of wool contained in said barn by having the same verified and certified by the original vendors of said wool, as fully set forth in plaintiff's second amended petition therein.

Plaintiff admits that the quoted clause of the policy set forth in the defendant's third defense is substantially correct, but denies that the interest of the plaintiff in said property, or any part described in said policy, was not truly stated by plaintiff to defendant.

Plaintiff further denies that the time of delivery or acceptance of said policy of insurance or any or all times thereafter, up and until the time of said fire, the interest, if any, of the plaintiff in said property, or a part thereof, described in said policy, was other than

unconditional and sole ownership; and denies that the same is not truly stated in said policy.

Plaintiff further alleges that the title or interest in any part described in said policy was encumbered by chattel mortgage and was fully known by the defendant Company, and was ratified and accepted by said defendant Company, and it collected premiums thereon and thereafter with full knowledge thereof, and that the same was fully known to the said defendant Company at all times and was fully ratified by said defendant Company, as more fully set forth in said plaintiff's second amended petition.

Plaintiff for reply to the fourth defense admits that the quoted portion or extract alleged to be taken from the policy of insurance is substantially correct, but denies that subsequent to said fire the plaintiff falsely and fraudulently stated in writing to the defendant under oath that according to the plaintiff's best judgment and belief said fire originated by lightning striking the building in which said alleged wool was stored. Plaintiff denies that he then and there well knew that said fire did not originate by lightning striking the building.

Plaintiff for reply to the fourth defense denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to the defendant that no other person or persons had any interest in said wool, or any part thereof, contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; plaintiff further denies that the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to, or an interest in said wool or a part thereof located in said building at the time of said fire.

Plaintiff further reply to the fourth defense, denies that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that at least seventy thousand pounds of unwashed wool belonging to the plaintiff was located in said building described in said policy at the time of said fire and was destroyed by said fire. Plaintiff further denies that the actual cash value of said wool described in said policy at and just prior to the time of said fire and the loss and damage thereto caused by said fire were each the sum of $28,700.00. And further denies that whereas, in truth and fact, as the plaintiff then well

Reply.

knew, the total amount of wool in fact contained in said barn at the time of said fire did not exceed twelve thousand pounds, and further denies, and whereas, in truth and fact, as the plaintiff then well knew, the actual cash value of such wool as there was located in said barn at the time of said fire, and the loss and damage thereto caused by said fire in fact did not exceed the sum of $4,000.00.

Plaintiff further denies that subsequent to said fire he further falsely and fraudulently stated to this defendant in writing under oath that no articles were mentioned in said sworn statement but such as were in said building damaged or destroyed and belonging and in the possession of the plaintiff at the time of said fire, and further denies that no attempt to deceive this defendant Company as to the extent of said loss had in any manner been made.

Plaintiff further denies that he then well knew, many articles were mentioned in said sworn statement which were not in said building damaged and destroyed and which were not damaged or destroyed in said building or elsewhere and which did not belong to and which were not in the possession of the plaintiff at the time of said fire. Plaintiff further denies that he well knew an attempt to deceive this defendant Company as to the extent of said loss had been made and was then and thereby being made by the plaintiff, as alleged in said fourth defense of defendant's answer.

Plaintiff further denies that any false and fraudulent statements made by him to the defendant, as set forth in the fourth defense or in any of the other defenses with any purpose or intent on the part of the plaintiff to deceive or defraud the defendant, and further alleges that the defendant was neither deceived or defrauded in this behalf or in any other respect, as set forth in defendant's answer.

Wherefore plaintiff prays for judgment as in his second amended petition set forth.

James Joyce,
Elmer Murphy,
F. S. Monnett,
Attorneys for Plaintiff.

[Duly verified.]

ENTRY—Filed June 13, 1928.

This day these causes came on to be heard whereupon it is ordered by the court that said causes be, and the same hereby are, consolidated for the purposes of trial, to which order of consolidation the defendant excepted.

And thereupon to try the issues joined between the parties, a jury being called came, to wit: James Ballentine, J. A. Black, Pearl Durnelle, J. D. Dunnigan, Beriah Edwards, Samuel Eichenbaum, Clarence Ewing, R. P. Enderlin, Homer Feldner, George Hartman, Jerry Hammon, and Joseph Henderson, who were duly empaneled and sworn well and truly to try the issues joined between the parties in said causes, and at the hour of adjournment, the testimony not being concluded, the court respited the jury until nine-thirty o'clock tomorrow morning, to which time these causes are continued.

ENTRY—Filed June 14, 1928.

This day again came the parties, by their attorneys also the jury heretofore empaneled and sworn herein, and having heard the testimony on behalf of plaintiff and defendant, thereupon defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled, to which ruling of the court the defendant excepted. Whereupon came the plaintiff and moved the court to instruct the jury to return a verdict in favor of the plaintiff, which motion was by the court sustained and the jury was instructed to return a verdict for the plaintiff for the sum of $8000.00 with interest from Sept. 6, 1926, to which ruling of the court the defendant excepted.

Whereupon came the jury and upon their oaths do find the issues joined in favor of the plaintiff and assess his damages at the sum of $8000.00 with interest from Sept. 6, 1926.

VERDICT—Filed June 14, 1928.

We, the jury, herein do find the issues joined in favor of the plaintiff, and assess his damages at eight thousand dollars, with interest from Sept. 6, 1926.

(Signed) R. C. Enderlin,
Foreman.

MOTION FOR NEW TRIAL—Filed June 16, 1928.

Now comes the defendant, The Home Insurance Company, and moves the court to vacate and set aside the verdict of the jury heretofore rendered herein and to grant a new trial herein upon the following grounds, to wit:

1. The verdict of the jury is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.
2. The verdict of the jury is contrary to the evidence and the weight thereof.
3. The verdict of the jury is contrary to law and the evidence.
4. The verdict of the jury is contrary to law.
5. The findings and decision of the court, and each thereof, is contrary to and against the clear and manifest weight of the evidence and is not warranted or sustained by sufficient evidence or by any evidence submitted in the case.
6. The findings and decision of the court, and each thereof, is contrary to the law and evidence.
7. The findings and decision of the court, and each thereof, is contrary to law.
8. The court erred in excluding certain evidence offered by the defendant, to which action by the court the defendant at the time excepted.
9. The court erred in admitting certain evidence offered by the plaintiff over the objection of the defendant, to which the defendant at the time excepted.
10. The court erred in not striking from the record

or excluding from the consideration of the jury, on motion of the defendant, certain evidence offered on behalf of the plaintiff, to which ruling of the court the defendant at the time excepted.

11. The court erred in overruling the motion made by the defendant at the conclusion of the statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the statement of the case by plaintiff's counsel upon the ground that upon the statement of the case made by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

12. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

13. The court erred in its general charge to the jury.

14. The court erred in overruling the motion made by the defendant at the conclusion of the plaintiff's case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

15. The court erred in overruling the motion made by the defendant at the conclusion of all of the evidence in the case to direct the jury to return a verdict for the defendant, to which ruling the defendant at the time excepted.

16. There was error and abuse of discretion in the order of the court consolidating this action with four other actions pending in this court, to which the defendant at the time objected and excepted.

17. The court erred in directing the jury to return a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

18. The court erred in not submitting to the jury the issue as to the amount of the loss.

19. The verdict of the jury is excessive.

20. There are other errors of law prejudicial to defendant appearing on the face of the record which occurred at and during the progress of the trial and to all of which errors this defendant at the time duly excepted.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

ENTRY—Filed August 7, 1928.

This cause coming on for hearing, on the motion of the defendant to set aside the verdict, and for a new trial herein, the court, on consideration thereof, overrules the same.

It is therefore considered by the court that the said plaintiff, J. M. Scott, recover from the said defendant, The Home Insurance Company, the said sum of $8922.66, as heretofore, by the verdict of the jury, found due him, with interest computed to the date of this entry, together with his costs herein expended, taxed at $..... including a docket fee of $20.00 payable to the attorneys for the plaintiff, under provisions of Section R. S. V. S., 572, Title 28.

To all of which ruling, order and judgment the defendant excepts.

Benson W. Hough, Judge.

ORDER EXTENDING TIME FOR FILING DEFENDANTS' BILL OF EXCEPTIONS—Filed September 13, 1928.

Upon application of the defendants, and each of them, and for good cause shown, the time for filing and having allowed and signed the bill of exceptions in the above entitled causes, and each of them, is hereby extended to October 1, 1928.

Hough, Judge.

BILL OF EXCEPTIONS NARRATIVE FORM—Filed September 22, 1928.

Wednesday Morning Session, June 13, 1928.

Present:

Messrs. James Joyce, F. S. Monnett and Elwood Murphy, on behalf of the plaintiff.

Messrs. R. M. Edmonds and G. E. Bibbee, on behalf of each defendant.

Be it remembered, That on the trial of the above entitled causes in the District Court of the United States for the Southern District of Ohio, Eastern Division, at the June, 1928 term thereof, before the Honorable Benson W. Hough, a Judge of said Court, and a jury duly empaneled and sworn, the following proceedings were had:

The Court, before the commencement of the trial of the above entitled causes stated and ordered in open court that the above entitled causes should be and were consolidated for the purposes of trial and tried in one trial.

Mr. Edmonds: If the Court please, at this point the defendant insurance companies, and each of them, The Sun Insurance Company in case 2563, The Home Insurance Company in case 2560, the Norwich Union Fire Insurance Society in case 2564, The Westchester Fire Insurance Company in case No. 2562 and the New York Underwriters Insurance Company in case 2561, and each of them object to the consolidation of these cases for a trial in a single trial, upon the ground that the issues and questions involved in the several cases are not identical but different.

Second, that in three of the cases, namely, the case against The Home Insurance Company, the case against The Norwich Union Fire Insurance Company, the case against the Sun Insurance Office, the question arises as to the effect of a loss payable clause attached to these policies which question is not involved in any way in the other cases. The defendants object to consolidation upon that ground.

The next ground of objection is that different agents issued the several policies and another agent the remaining two and that the questions involved are different in that respect.

The next ground of objection is that the question of parties arises in these cases which question will be common to some but not involved in others of the group.

For these reasons, each of the defendant insurance companies object to the consolidation of the cases.

The Court: Objection by counsel for the defendant

representing the five defendants may be entered on the record and the objections are overruled and exceptions of the several defendants noted, it appearing that these cases filed in the state Court were removed by the defendant insurance companies to this Court to apply to the jurisdiction of this Court for trial, and it further appearing that the plaintiff is identical in all five cases and that the subject matter of the suit depends upon a loss by fire which is common to all the cases.

If corporations insist upon invoking the jurisdiction of this Court it will be necessary for them to submit to the orders of this Court in questions of the procedure in trial. The cases will be consolidated and are consolidated and will be tried by one jury. Call the jury, Mr. Clerk.

To all of which rulings each defendant in the several above entitled cases at the time duly excepted for the several reasons stated in the objection to consolidation.

Thereupon statements of the case were made by counsel for the respective parties.

Wednesday Morning Session, June 13, 1928.

The Court: The plaintiff may state its case against the defendants to the jury.

Mr. Murphy: May it please the Court and Gentlemen of the Jury, there are five cases to be submitted to you in which J. M. Scott of Cumberland, Guernsey County, Ohio, is the plaintiff and the names of the defendant insurance companies have already been stated to you by the clerk when he swore you.

We expect the evidence to develop this state of affairs: J. M. Scott is a wool buyer, has been for years, is now, and lives in Cumberland, Ohio, and transacts his business there.

The Court: Just a minute; any separation of witnesses desired?

Mr. Murphy: Not on our part, Your Honor.

Mr. Edmonds: Yes, Your Honor.

The Court: All witnesses to be used in the trial of the cases on either side may retire from the Court Room until called as witnesses.

Mr. Edmonds: If your Honor please, the representatives of the insurance companies we may want to have in at times and may want to use as witnesses, if that is permissible.

The Court: Each of the defendant companies is entitled to one representative to represent it in Court. That is all right.

Mr. Murphy: In this town of Cumberland, on what is

known as Cumberland Street the plaintiff owned a barn, frame building, used for storing wool; adjacent thereto, on the same lot, he lives in his six room house, owned by himself, occupied by himself, his wife and his daughter.

On the 6th day of September, 1926, the plaintiff had stored in this wool house about 82,000 pounds of unwashed wool, his own individual property.

The Court: 80,000 pounds, you say?

Mr. Murphy: 82,000 pounds and a little over. On the morning of the 6th of September, while this wool was in there, the wool house took fire and was totally destroyed, the building and all the contents, including this 82,000 pounds of wool. We believe the evidence will show that this wool was worth, at the time of its destruction at Cumberland, Ohio, from 40 to 42 cents per pound, in other words, approximately $33,000.00. This fire occurred about 3:30 or 4:00 o'clock in the morning at a time when there was a terrific electrical storm passing over there, thunder, lightning and rain. This building was owned by the plaintiff, worth about $3,000.00 and insured for $700.00 only. The property in which he lives, which is about 80 or 100 feet away, his dwelling is worth $5,000.00 and insured for $3,000.00. In it sleeping that night were his wife, an invalid, himself and his daughter. He was wakened up by the crash of fire. At the time of this fire each of these defendants had insurance policies on this wool ranging from $3,500.00 to $8,000.00 each. Some had existed for some time. The latest one was the 14th day of August preceding the fire.

Prior to the time of the fire the plaintiff had placed upon the wool 45000 pounds of it, a chattel mortgage in favor of The Cumberland Savings Bank of Cumberland, Ohio,—40,500 pounds of wool, that is it. At the time of the placing of the mortgage upon this wool, three of the defendants, the Home Insurance Company, The Sun Insurance Office and The Norwich Fire Insurance Company, were notified, as the agent of the company was also connected with the bank to which he gave the chattel mortgage and immediately attached to said policies the loss payable clause. On the 14th day of August he went to the agent of The New York Underwriters Insurance Company, as well as the agent of The Westchester Fire Insurance Company of New York and there obtained from that agent, whose name is Stottsberry, a renewal of his insurance policy of $3,500.00 with The New York Underwriters Insurance Company, who, as I say, was also the agent for The Westchester Fire Insurance Com-

pany and got that renewal at that time and at that time told Mr. Stottsberry, who is the agent who issued the policies and was at the time of which I speak, that there was a chattel mortgage on this property of 40,500 pounds of it, with The Cumberland Savings Bank of Cumberland, Ohio. No cancellation was made of the policies, no demurrer was entered by these two insurance companies of which I speak. It ran along until the fire. After the fire occurred, Mr. Scott immediately notified each of the defendant companies' agents that came there to represent them a week or so afterwards and Mr. Harrod, as an adjuster of the companies. The evidence will show that the adjuster and Mr. Scott met in The Cumberland Savings Bank rooms, and there a conversation was begun about the loss. Mr. Harrod said to Mr. Scott, "Now, you know, Mr. Scott, that there wasn't 78,000 pounds of wool in that building and it didn't burn and couldn't burn." Mr. Scott said to him "Mr. Harrod, it did burn and it was there." Mr. Harrod further said "Your building will not hold that amount of wool." Mr. Scott said "You don't know what you are talking about, for I loaded out of that building at one time 178,000 pounds of wool or thereabouts." Then Mr. Harrod said to Mr. Scott "Let us go to the building that was burned." So they went down there through two alleys, arrived at the building and it was viewed by both of them. Mr. Harrod said to Mr. Scott "Will you help me measure this building?" Then they took measurements, talked some more about the fire and then went up to the porch of this dwelling, on the same lot owned and occupied at that time by Mr. Scott. Mr. Harrod said to Mr. Scott "You will have to get a list of the names of the people from whom you bought this wool." Well, Mr. Scott said, "I will do the best I can. I am dealing with two or three hundred people and it may be difficult to get a full list but I will do the best I can." Mr. Harrod said "You will have to." He said "Mr. Harrod, that is pretty strong language. I again say to you I will do the best I can with the help of my boy. What more do you want me to do?" Mr. Harrod "You get the list, signed by the people from whom you bought this wool and if it amounts to 70,000 pounds you needn't do anything further." Now Mr. Harrod said "Mr. Scott, you will receive the regulation letter from these companies soon but pay no attention to that and I will come back and take up the matter with you, check over the names of the persons from whom you bought this wool and the amount and if it amounts to 70,000 pounds

or more we will settle, and there will be no further trouble."

Mr. Scott then, with the assistance of his son, and at the expense of about $200.00, besides the time, which took about thirty days or more, obtained the signatures of the persons from whom he bought this wool and the amount. I will say this wool was mostly bought in 1925. It was unwashed wool; it was what they call hold-over wool. It was bought at a higher value than wool was bringing in 1926. In 1926 he bought perhaps about 10,000 pounds of this wool, unwashed wool. After this Mr. Scott made up and sent to the different insurance companies his proof of claim within sixty days, to-wit, about the 4th day of the following month. That will be produced in evidence, to save time. He performed all the conditions of the policies, and each of them incumbent upon us to be performed. We were the sole owners, unconditionally, of this property at the time it was destroyed and at the time it was insured except the chattel mortgage of which I spoke, of which each of the defendants had full knowledge.

Aside from the wool in the barn which burned, were 144 wool bags of a value of $57.60. The total insurance on this property that was destroyed was $28,000.00 at the time of the fire and the value was far in excess of that. Each of these insurance companies had notice of the other insurance on the property at that time.

The evidence will show that there was some other wool in that building at the time it was burned insured by some of these same defendant insurance companies but it was separted from the wool owned by Mr. Scott. That insurance has been adjusted and paid. The insurance on the barn, I think, too, was paid.

The Court: Now just a minute. Will you give the amount of insurance on all the various policies of the defendants and when it was taken? Start with the Home.

Mr. Murphy: The Home $8,000.00. The New York Underwriters—

The Court: What was the date when that insurance went into effect?

Mr. Murphy: I will get you that. I don't have it.

Mr. Monnett: It is in the petition.

The Court: You can get it a little later. The New York Underwriters, $3,500.00?

Mr. Murphy: Yes.

The Court: The Westchester?

Mr. Murphy: $5,000.00.

The Court: The Sun Insurance Company?

Mr. Murphy: $5,750.00.

The Court: The Norwich?

Mr. Murphy: $5,750.00.

The Court: And the fire took place September 6th, 1926?

Mr. Murphy: Yes, at 3:30 or 4:00 o'clock in the morning.

The Court: The chattel mortgage was given when, sometime in June?

Mr. Murphy: Some time in June preceding.

The Court: June, 1926?

Mr. Murphy: Yes. Your Honor, I understand now that the Home Insurance policy was not renewed on August 14th, but it was a new policy. Mr. Stottsberry issued a new policy instead of a renewal on August 14th with The New York Underwriters.

The Court: You said Home. Is it the New York Underwriters or the Home?

Mr. Murphy: That is the New York Underwriters.

Mr. Monnett: August, 1926.

The Court: State the case of the defendants.

Mr. Edmonds: If Your Honor please, at this point, after the statement of the case by plaintiff's counsel the defendant insurance companies, The Home Insurance Company, the Norwich Union Fire Insurance Company, The New York Underwriters Insurance Company, The Sun Insurance Office, The Westchester Fire Insurance Company and each of them move the Court for a judgment in its favor respectively, upon the statement of the case made by plaintiff's counsel to the jury. The ground of this motion as to the Home Insurance Company, the Norwich Union Fire Insurance Society and the Sun Insurance Office is, first, that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss payable clauses making the loss payable to the Cumberland Savings Bank. That fact is also alleged and admitted in the pleading. Plaintiff's counsel has stated that the Cumberland Savings Bank at the time of this fire was interested in this wool by way of chattel mortgage and was a part owner thereof and with those facts the cases against these three companies are cases in which the cause of action, if any, under the policies, is a cause of action belonging to the plaintiff and the Cumberland Savings Bank jointly, whereas his petition alleges the plaintiff claims a cause of action lodged in himself exclusively.

Bill of Exceptions.

Code, Section 11256, expressly provides that parties who are united in interests must be joined as plaintiffs or defendants. As the Supreme Court held in Upjohn vs. Ewing, 2 O. S. 14, joint creditors must be joined and all must recover or none can recover.

In Aetna Ins. Co. vs. Penn. 4 Nisi Prius, New Series, page 97, first syllabus (reading)

The Court: That would be a splendid way to dispose of the cases for the convenience of the Court and Jury but I don't think the Court could intelligently dispose of them along that line at this time.

Mr. Edmonds: May I proceed? I had one other ground.

The Court: Yes.

Mr. Edmonds: The motion on behalf of The Home Insurance Company, The Norwich Union Fire Insurance Company, the Sun Insurance Office as well as the separate motions of The New York Underwriters and The Westchester Fire Insurance Company are based also upon the further following ground, that from the statement of plaintiff's counsel it appears that at the time these policies were issued and at the time of this fire this wool, or part, was incumbered by chattel mortgage. The pleadings allege and admit that these insurance contracts all contained provisions which provide that

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." No facts are stated by plaintiff's counsel which void in law this admitted violation.

The Court: Motion overruled and defendants' exceptions, one and several, may be made a part of the record.

Mr. Murphy: Gentlemen, I forgot to say that this wool was destroyed in the same building in which it was insured. On the 24th day of November, 1926, the defendant companies, each of them, sent to the plaintiff a statement, following his proof of loss to them, in which he stated that his knowledge—to the best of his knowledge and belief the fire was caused by lightning. In this they return a copy of this, they did accept it, returning a copy of it and said that it was refused for the reason that the same does not state his knowledge and belief as to the time nor origin of the fire. The proof of loss, when submitted to you, will show that Mr. Scott said therein that to the best of his knowledge and belief the fire originated by lightning striking the building and the time was about

four o'clock A. M.; they stated in that that they disagreed as to the value of the loss or damages. The Home Insurance Company, likewise these others, "disagree with you as to the amount of loss or damage caused by fire." That is all they ever did, never asked for the appointment of arbitrators, never came any more, never sent anyone and that is the first and only knowledge that the plaintiff had that there was a disagreement; says they disagree, but they did not disagree. When Mr. Harrod was there there was absolutely no disagreement and no appraisal asked for because, at the time Mr. Harrod and Mr. Scott were at the ruins, Mr. Harrod said there is nothing here to appraise, it is a total loss. Remember my statement, this was unwashed wool, the fire occurred on Monday morning Labor Day, and it smoldered and burned until the following Friday before it entirely consumed the wool. Then he demanded that we get signatures of the parties from whom we bought this wool, because the other records were burned, and Mr. Scott did and he never came back to see it. It is now, and has at all times, and is now at their disposal for their inspection. Copies, I believe have been furnished and the original is here for their inspection showing the amount of over 82,000 pounds of wool.

Mr. Monnett: May I suggest, Your Honor, inasmuch as at the close of defendant's statement that they made on behalf of each and several of the defendants, that on the part of the plaintiff the jury be directed to return a verdict for the plaintiff in each case because they do not state, and do not plead, that they have tenedered back the premiums that they received for these respective policies and still hold them; it was held here in the Laughlin case that after they sued for a void contract and kept the proceeds of the note that they are bound to make the tender before they file such answer, and in his statement this morning he does not claim that he ever returned any of these premiums that were paid for these insurance policies, but, on the contrary, holds them.

Mr. Edmonds: If your Honor please, at the conclusion of the statement of the case by plaintiff's counsel and the reply statement of the case by Plaintiff's counsel, each of the defendant insurance companies moves the Court to arrest the case from the jury, render judgment for each separate defendant insurance company upon the statement of plaintiff's counsel for the reasons that plaintiff's counsel has stated that the insurance contracts of these three companies each contained loss pay-

able clauses making the loss payable to the Cumberland Savings Bank. That fact is also alleged and admitted in the pleadings. Plaintiff's counsel has stated that the Cumberland Savings Bank at the time of this fire was interested in this wool by way of chattel mortgage and was a part owner thereof and with those facts the cases against these three companies are cases in which the cause of action, if any, under the policies, is a cause of action belonging to the plaintiff and the Cumberland Savings Bank jointly, whereas his petition alleges the plaintiff claims a cause of action lodged in himself exclusively; and for the further reason that in violation of the terms of each policy and without consent endorsed thereon the wool or a part thereof described in the several policies was encumbered by chattel mortgage at the time of the fire.

The Court: The motion is overruled and exceptions for each of the defendants is noted in the record.

Mr. Edmonds: May I add one other statement to the grounds, in addition to those stated in the first motion, and that is that plaintiff's statement of the case and the reply statement admits the disagreement between the plaintiff and the respective defendants as to the amount of this loss, and that the amount of the loss has not been ascertained by appraisal.

The Court: Again the motion and the remarks in connection therewith are overruled, and the exception of each defendant is noted in the record.

Be it remembered, that the plaintiff, to maintain the issues on his part to be maintained, offered and introduced in evidence the following testimony and evidence, to wit:

J. M. Scott,

called as a witness in his own behalf, being first duly sworn, testified as follows:

Examined by Mr. Monnett.

My name is J. M. Scott, James Madison, full name, generally write it J. M. I am slightly hard of hearing. Should you or the counsel at any time not make yourselves understood, I will indicate it. I reside at Cumberland, Ohio, and in September, 1926, at Cumberland, Ohio. In 1926 I owned the property we live in, and then I had my barn on the same lot, that is the property I had in the town. The size of the area of the lot including my wool warehouse or barn and my house is about 190 feet long; it is a little longer at one end than the other, one end about 190, the other end 170. The loca-

tion of my warehouse or barn was on the northwest corner; my residence was on the southeast corner. Mrs. Scott, my daughter, Hazel, and myself occupied the residence on the date of the fire. The room where Mrs. Scott and I slept was on the west side of the house next to the barn. The barn was about 90 feet farther west and was of frame construction 33 by 40 feet. Two rooms were used for storage. There was a basement which was only used for trunkery and the like, never used for wool. The basement contained some refuse lumber and some good lumber which had been there some two or three years. The whole area of the first story of the barn is about ten feet high, with one partition, a box stall in the southwest corner about eight feet square. Nothing in that box stall at this time. In the remainder of the first story at this time there was stored wool belonging to me except about four thousand pounds stored there in 1925 in a little space next to the stairway to which I had no title. I had about forty thousand pounds of unwashed Delano wool in that first story, some of which had been there over a a year, and some not there so long, some there possibly ten months, I bought some in November of 1925, that was all there and all my sack wool that was in there was carried over, stored in 144 sacks already packed up and ready to ship. The second story was the entire contour of the barn excepting the stairway where we went up, where we put just the loose wool, not sacked wool. "In the season of 1926, I was doing business for Johnny McCurdy Company, New York, I took and piled it up, riprapped it up in front, I threw the wool promiscuously back over that way one-half the building." No consignee wool in this story. This was all my unwashed Delano wool, from thirty-eight to forty thousand pounds.

Mr. Edmonds: Mr. Monett, if you will let us look at those policies, we probably can stipulate in the record those were the policies issued.

Mr. Monnett: Anything to shorten it, sir.

(Counsel for the plaintiff hands counsel for the defendants insurance policies.)

Mr. Edmonds: We are willing to stipulate that these exhibits are the policies sued upon.

Thereupon the insurance policies, produced by counsel for the plaintiff, were marked, for the purpose of identification, as "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4" and "Plaintiff's Exhibit No. 5."

J. M. Scott.

The Court: These are admitted on the stipulation that they are the policies on which these suits are based.

Thereupon the exhibits, heretofore marked for the purpose of identification as plaintiff's Exhibits 1 to 5 inclusive, were admitted in evidence on behalf of the plaintiff, marked "Plaintiff's Exhibit No. 1", "Plaintiff's Exhibit No. 2", "Plaintiff's Exhibit No. 3", "Plaintiff's Exhibit No. 4", and "Plaintiff's Exhibit No. 5", and are hereto attached and made a part hereof.

The Witness: The policy marked Exhibit No. 1, The Home Insurance Company, stipulates that in consideration of $101.60 premium paid by the insured, from the 6th day of July, 1926, to the 6th day of July, 1927, at noon, against all direct loss or damage by fire, I paid that amount and got a receipt therefor.

Exhibit No. 2 is the New York Underwriters Insurance policy, which is for $3500.00, rate $1.27, stipulated premium of $44.45, for the term of one year from the 14th day of August, 1926, to the 14th day of August, 1927, at noon, against loss; I paid that $44.45. This was paid to Edward Stottsberry. The Home was paid to Mr. J. M. Bracken.

Q. Where did they live? A. Both live in Cumberland; they were the agents.

Mr. Edmonds: We object.

Mr. Monnett: You admit they were your agents.

Mr. Edmonds: We admit these were the local agents that solicited and countersigned these policies. The policies speak for themselves.

The Court: Go ahead.

Mr. Edmonds: I should say respectively signed the policies whose names they appear on.

The Court: The two individuals mentioned are respectively the agents of the two companies heretofore mentioned, The Home Insurance Company and the New York Underwriters Company.

Mr. Edmonds: Each individual being the agent for the respective company whose policy bears his countersignature.

The Witness: Plaintiff's Exhibit 3 is policy of Westchester Fire Insurance Company of New York, amount of insurance $5000.00, rate 1.48, in which the stipulated premium is $74.00, for insurance from the 1st day of April, 1926, at noon, to the first day of April, 1927, at noon; that premium of $74.00 was paid to I. E. Stottsberry.

Plaintiff's Exhibit 4 is policy of Sun Insurance Office,

Established A. D. 1710, amount of insurance $5750.00, rate 1.27, premium $73.02, in consideration of the insurance to J. M. Scott, for the term of one year from the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that amount was paid to the company.

Plaintiff's Exhibit 5, Norwich Union Fire Insurance Society, Ltd., is defendant's policy, amount of policy $5750.00, rate 1.27, premium $73.02, in consideration of the stipulations therein named to insure J. M. Scott for the term of one year, beginning the fourteenth day of June, 1926, at noon, to the fourteenth day of June, 1927, at noon; that was paid to Mr. Bracken, the agent.

Q. I will ask you whether any of those premiums have ever been tendered back to you either before or after this suit?

Mr. Edmunds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant, the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes I thought you had answered. A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted.

The Witness: The building described in each of these policies as a two-story, slate roof frame building, occupied as wool storage on the west side of Cambridge Street, risk #50, map 117½ Cumberland, Ohio, is the building I have just described to the jury, and these are the buildings that contained the wool I have insured. These policies all cover the same building, or the wool rather.

There is on Exhibit No. 1, attached on the face of said policy, the following: "Uniform Standard Ohio, Form No. 111, Loss Payable Clause. Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 173 of the Home Insurance Co., New York, issued at its Cumberland, O. Agency.

Dated June 6, 1926. J. M. Bracken, Agent." and was upon the policy at the date it purports to be.

There was attached to plaintiff's Exhibit No. 5 on or about June 24, 1926, "Uniform Standard Ohio, Form No. 111, Loss Payable Clause. Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, O., Agency. Dated June 24, 1926. J. M. Bracken, Agent."

On June 24, 1926, there was attached to policy Exhibit No. 4, "Uniform Standard Ohio, Loss Payable Clause, Form No. 111. Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy. Attached to and forming part of Policy No. 288271 of the Sun Insurance Office, Chicago, Ill. issued at its Cumberland, Ohio, Agency. Dated June 24, 1926, J. M. Bracken, Agent."

The nature of my indebtedness to the Clumberland Savings Bank Company was a chattel mortgage on forty some thousand pounds of wool at the price of that pile of wool to secure the money that I had borrowed out of the bank; only needed to borrow for my wool business.

Q. Can you state to the jury what was the amount obtained in money from the bank on which these are pledged in security to that amount? A. Well, I don't know whether I could or not until I look here, I would have to add them together.

Q. Take the three I have given you, can you take them?

Mr. Edmonds: We object, if your Honor please, the question of how much of the indebtedness was secured by this chattel mortgage is a simple question. I don't see what bearing that has on the policy.

The Court: Do you know how much money you borrowed on the chattel mortgage?

The Witness: I have in mind about $19,000.00.

The Court: That is near enough.

Q. Does that include these three?

Mr. Edmonds: We object.

A. That includes what I have in the Cumberland Savings Bank.

The Court: Objection overruled; exception.

J. M. Scott.

Q. Was Mr. Bracken connected in anywise with this Bank?

A. He was cashier of the bank at that time.

Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on the policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that, the evidence propesode to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an encumbrance by chattel mortgage, the entire policy shall be void, whereas, the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court. The defendant's exceptions may be noted.

(Question read)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I had borrowed from them. Now, let me just—

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said, "If you do, I will go to the office." He had company at home; his office was in the First National Bank of our town. I said, "No, it isn't necessary, you can write it out Monday morning and mail it, so I will get it through the mail; I am away from home during the week, and I will send you a check for the money," which he did.

Mr. Edmonds: Motion to rule out the answer and each part thereof, on the ground that it is a violation of the parol evidence rule.

The Court: You don't have to restate these reasons, we haven't time to listen to any dissertation upon it each time. Your motion to exclude the answer is overruled and your exceptions are noted, for the reasons announced in the objection to the question.

Q. I will ask you the same question, as to what, if anything, was said to I. E. Stottsberry, the agent's name appearing at the bottom of the policy, Exhibit No. 3, Westchester Fire Insurance Company, as to there being any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this question as the former, and the same reasons announced, and the court overrules the objection and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy, which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Monnett, possibly the conversation took place on Saturday, and I expect that policy will be dated on Monday, I remember very well I went down to his home, it was on Saturday evening.

J. M. Scott.

Q. Had that lien existed on there up as early as the other Policy, April 1, 1926? A. No, sir.

Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court: Objection overruled; exceptions noted.

The Witness: He did not.

(Narrative continued) The fire occurred on September 6, 1926, about four o'clock A. M. The first I knew of it Mr. Yoho who lives below us hollered fire; I got out of bed and went downstairs. The fire was coming out of the second story, out of the south window; that window had poultry wire over it, we put it there years before, and when storing wool, it was there for ventilation; it looked like the flame was coming out about twenty feet long. Mr. Yoho at this time was out on our back porch. I couldn't tell who else was there. We went to notify the fire department; we have just a chemical fire engine. Every available effort was made to stop the fire. The fire entirely consumed both the wool and building. I have some samples in my grip, about all that was left of the wool.

Q. At the request of counsel, did you bring that with you, and if so, you may produce a sample of the residuum?

(Witness produces cinders wrapped in a paper and exhibits them to the court and jury.)

The Court: I understand he brought this?

Mr. Monnett: We asked him for any sample of ashes left.

The Court: You asked him, Mr. Monnett?

Mr. Monnett: Yes.

The Witness: I just did this up kind of hurriedly, there is about all that was left, that was the condition of the cinders that was left.

The Court: Put it on the floor.

Mr. Edmonds: If your Honor please, how could this get in the record?

The Court: I think we will put a string around it and mark it as an exhibit and give it to the reporter; I don't care what he does with it.

Mr. Monnett: I have presented here a package that my client brought at our request, the residue or residuum

of this fire, and ask the court to mark that Exhibit No. 6, and offer it in connection with this witness' testimony.

Thereupon the cinders, last above produced by the witness, were offered, introduced and admitted in evidence on behalf of the plaintiff, marked Plaintiff's Exhibit No. 6, and are attached hereto and made a part hereof.

(Narrative continued) These cinders were about two feet thick and covered about two-thirds area of the barn. It took from Monday until Friday to so extinguish it as to leave it in this condition. The first thing I did in the way of communicating with the company, or any of its agents, I notified the agents that day, the local agents, and Mr. Bracken, the agent of these three companies, was in Cincinnati at the time, but Mr. Stottsberry and Mr. Claypool was assistant manager in the bank, and he communicated with those three companies; I don't know that the agents ever made any examination. Mr. Stottsberry came the next day; I don't remember how long he stayed; he didn't make much of an examination; he was on the premises while they were still smoking and burning; he lives in the city. His agency is three or four hundred feet from this place. He stays in the bank. The bank wasn't so far, about two hundred yards. This was smoking and burning from Monday to Friday. To the best of my knowledge he remained in the city two hundred yards away all that time. When Mr. Bracken, the agent, was home, his home would be a little bit farther away, and he was in Cincinnati at the time, don't know when he returned, not for a week I think. I do not think he had anybody from his bank there. Mr. A. C. Harrod; came I think he arrived the 13th or 15th of the month; the fire was the 6th; six or seven days after that he arrived. The first time he was there, I didn't see him, but he left word at my home for me to write him at Columbus. I was out in the country buying wool for Mr. McMurdy, by the time I got home and before I had time to write him, I saw him. You might call that his second visit to Cumberland. I can not give the approximate date I was there and he was there. I think that was the 16th or 17th of the month, maybe the 18th, I can't say to that.

Q. State to the jury as fully as you can and the best you can, from the time he came and left, what was done between you and him? A. The first notice I had of him being there, he sent Mr. Stottsberry down, one of the agents, to me, and he said, Mr. Harrod, the adjuster, was up at the bank and wanted to see me. I went up

with Mr. Stottsberry, went back in the directors' room of the bank where they were sitting and was introduced to Mr. Harrod, and after possibly a remark or two was made, he produced this paper that they say I signed, which I did, that they call a waiver, asked me to read that over and sign it if I would. I read it over, and I thought, the most significant thing I seen in it was —

Mr. Edmonds: We object.

Q. State what conversation you had with him about it? A. I told him I didn't see anything wrong about signing that paper and signed it.

Q. What then took place? A. He asked me questions about the fire.

Q. Can you give the jury the dialog about the fire as near as you can; what he asked you and what you replied? A. He asked me questions of the wood I had.

The Court: Now the plaintiff in this action has testified he signed a waiver or paper, which necessarily will have to be construed before we get through. At this point, why don't you produce that and get it in the evidence, so we will have it in an orderly way?

Mr. Monnett: We served notice on them to produce it.

Mr. Edmonds: You have a copy of it, haven't you?

Mr. Monnett: No, I thought we had it here.

Mr. Edmonds: You had a copy and retained it at the time it was signed.

The Court: Have you the original?

Mr. Edmonds: It was in triplicate, we have a copy, if they can't produce it.

Mr. Monnett: We served notice on them.

Mr. Edmonds: At your request, the defendant produces the non-waiver agreement.

The Court: No, at the order of the court.

Mr. Edmonds: Yes, the order of the court.

Mr. Monnett: This seems to be the original.

Thereupon the paper writing, last above referred to, was for the purpose of identification, marked plaintiff's Exhibit No. 7, and was offered in evidence by the plaintiff and was admitted by the Court.

Q. This purports to be on the 15th of September, 1926, J. M. Scott.

The Court: 15th of September.

Q. Yes; J. M. Scott, and then below that, Companies in interest, A. C. Harrod, Adjuster; now after—

The Court: Now, let's see, there is an assumption on the part of the adjuster to represent all five companies. Do you make any question about that?

Mr. Edmonds: As to his authority to sign that; no, it is stipulated that he had authority to sign that agreement on behalf of each defendant insurance company.

The Court: Then over and above the five law suits filed in this court, in each there is a common plaintiff and in each the subject matter of the contest is over the loss by fire on September 6th, of the wool and the building. I say, over and above that, we find that all companies are represented by one common individual, common adjuster. That might be announced as a further reason on the part of the court in consolidating and trying these cases together.

Q. Subsequent to this waiver, what was done in the way of Mr. Harrod requesting you—

Mr. Edmonds: Subsequent to this waiver; it is a non-waiver agreement, you call it a waiver.

Mr. Monnett: Exhibit 7. The court has held you can waive a waiver, as well as an original contract.

Mr. Edmonds: My objection is that you are not designating it correctly.

Q. I will call it No. 7; what, if anything, was done between you and Mr. Harrod, representing these five companies, subsequent to this to determine the value of the loss of this property; state what took place in your own way . A. Well, he asked me questions as to the amount of wool I had and jotted them down.

Q. The amount of the wool in your policies? A. No, the amount of wool I had consumed in the fire.

Q. Insured in the policies? A. Yes.

Q. He asked you the amount of wool as to what; now what about it?

The Court: That is a wrong conclusion. The question here is whether the wool that was burned was insured or was not. The other side claims apparently it was not insured. Under the various conditions of the policies, there was no liability, if there was no liability, no insurance on it.

Mr. Monnett: On the other hand, if they take the position of no insurance, they can't be heard to object if we made no proof then.

The Court: Object to what?

Mr. Monnett: They can't object to proof if we made none, if we made no proof.

The Court: The form of the question was the objection.

Q. State what was said by this adjuster, between you

further, as to the fire, give it in order the best you can from start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and fixing the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: In so far as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted.

(Narrative continued) My conversation with Mr. Harrod began after I signed that waiver, number 7; he asked me about the amount of wool and if I was the sole owner of it and all those questions. I answered "I am not certain about the amount of wool I had, Mr. Harrod." I said "My books were all burned, I kept my books in the barn and in the wool storage room", "my accounts were all burned." I am only giving from memory, but I had from seventy to eighty thousand pounds, I couldn't tell you, but I am satisfied I had seventy thousand, I believe I had eighty." He put this down. After he talked and asked these questions, he dismissed the two local agents and they went out of the room. They had not any more than gotten out of the room, when he took a lead pencil out of his pocket, looked at me and said, "Scott, you know you didn't have eighty thousand pounds of wool in that barn, it wouldn't have burned, another thing, that barn wouldn't have held it." My answer was "Mr. Harrod, I didn't say I had eighty thousand pounds of wool in that barn, I said I believed I had, I said to you I knew I had upwards of seventy thousand pounds of wool in that barn, and I had a standing offer from Mr. McMurdy

for forty-five cents a pound," I know it burned." His answer was "I would like to make measurements of that barn, will you help me?" and I said "sure", and went down with him. He proceeded first to measure the foundation by pillars of the entire countour of the barn; the contour of the barn was still traceable. He produced a tape line; I carried the tape line. I don't know what measurements he took, I carried the tape line for him; I put it where he ordered me to take it. I couldn't say if he made substantially correct measurements, so far as running the tape. After that he asked me to show him where the wool was located in the barn by pillars still located there, which I did. The pillars were posts mostly set in cement foundation. I am speaking of the stone and brick, the posts were consumed. He wanted me to explain where the two different bunches of wool, the sack wool and the wool upstairs in the second story, were located, and the wool in that first story, which I proceeded to do, taking the foundation as a guide. I proceeded to sow first where the one hundred and forty-four sacks of wool were, designating this box stall in the corner which had no wool in it. Then, I proceeded to give him the dimensions of the upstairs. I have loaded one hundred and eighty-five thousand pounds of wool out of that barn at one time, I explained that to him up in the bank. After we got through the measurements, I said "Mr. Harrod, I want to call your attention right down there", showing him where I took the wool on the Saturday before the fire for Mr. McCurdy; I says he has written me repeatedly there would be some salvage possibly damaged by ——. I was buying wool for Mr. McMurdy in that season. I was putting it there. The wool was all taken out of there on the 28th of August, and on the 4th of September I began putting in wool for Mr. McMurdy, that is the Saturday before the fire. I mean all the McMurdy wool was taken out of that barn; then on the 4th of September I began taking in wool in the afternoon for Mr. McMurdy again. I had no help and I piled it on the first floor, and I intended to put it upstairs, always put loose wool up in the second story. I told Mr. Harrod that Mr. McMurdy had "repeatedly written me and I have repeatedly written him there was no salvage left, it was an entire loss." Mr. Harrod said "Yes, whatever is there is an entire loss." He did not go around and examine these cinders. It was in view. I believe he did take a stick and stir them. He had me walking around and he remarked "Pretty

bad to have you walk around through there." It was all visible to him. There was no salvage at that time and no wool left that was not consumed.

Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that the parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can save your exceptions.

Q. What requirement did he then make of you? A. He asked me, he said, "Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them." I says, "I will do the best I can," I says, "I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment." I had bought before this and shipped several carloads the same season. He said, "You can remember." I says, "It is a pretty big thing," I says—I told him I would do the best I could.

Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the best I could, and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

Q. You may state to the jury— A. I haven't told you all.

Q. Go ahead? A. Then he says, "Well, Scott, I wouldn't know any way to say but the one, you have to." He says, "It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss."

"Well," I says, "I recognize that fact, but", I says, "Wouldn't my oath amount to something in it?" He said the oath wouldn't do. I says, "I will still say what I said prior to this, I will do the best I can." I says, "I don't know how soon I can do it; we will go right at it. I will go and see my son and go at it." I says, "The roads are in such a condition, we can't travel by automobile."

Q. Unimproved roads? A. Yes, unimproved roads. He says, "That is about all that can be done until you get that proof of loss, and I will come back and check up with you sometime." I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, "Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me?" and he says, "No." He says, "You get that gathered up, Scott, and there will be no trouble, we will have a settlement." He says, "In the meantime you will get a form like that we usually send out, but you pay no attention to that, you go right ahead and gather up this wool." I says, "I will do it."

Motion by counsel for defendants to strike out each and every part of the answer on the same grounds.

The Court: Same ruling and same exception.

Mr. Monnett: I ask the stenographer to mark these papers in their order.

Thereupon paper writings, produced by counsel for the plaintiff, were, for the purposes of identification, marked "Plaintiff's Exhibit 8", "Plaintiff's Exhibit 9", "Plaintiff's Exhibit 10", "Plaintiff's Exhibit 11", "Plaintiff's Exhibit 12", and "Plaintiff's Exhibit 13."

Mr. Monnett: I have here some manuscripts, beginning with Plaintiff's Exhibit 8 to Plaintiff's Exhibit 13, inclusive, which says, "Cumberland, Ohio, November 30, 1926. We, the undersigned, residents—

Mr. Edmonds: We object to counsel reading it; may we look at the document?

Mr. Monnett: Yes (handing same to counsel). They went out in compliance with their request and got the amount of wool from each of the purchasers.

The Witness: Everyone, the farmer's own signature, his own handwriting.

The Court: What is the objection to this?

Mr. Edmonds: We haven't seen them, your Honor, I would like to look at them.

J. M. Scott.

The Court: While you are looking those over and deciding, we will take a recess for the noon hour.

Thereupon a recess was taken until 2:00 o'clock P. M. the same day.

Wednesday Afternoon Session, June 13, 1928.

And also

J. M. Scott,

resuming the stand, testified as follows:

Examined by Mr. Monnett:

Q. I now hand you these Exhibits and will ask you to look at them and state what you have had to do with them and what they are. A. This is the poundage of wool that we gathered up from different men.

Q. Does that represent the vendors or salesmen that sold the wool to you that was in this warehouse? A. Yes.

Q. Are those the names and the amounts and the dates that are attached on there? Do they represent the time that the particular men signed? Is that what Adjuster Harrod requested you to furnish?

Question objected to by the defendants as leading.

The Court: That is objectionable; he has already testified to that.

Q. Look them over; take No. 8 and state what ones of them personally obtained and what ones your son obtained, if you can. A. I obtained all on No. 8. Those are all those men's signatures.

Mr. Monnett: I will not take time to read them now.

The Court: They are not in evidence.

Q. What is the next one? A. It is No. 9. My son, I think, procured all of these.

Mr. Bibbee: What do you mean by all of these?

The Witness: I mean on this sheet.

Q. All the names on No. 9, you think, were your son's? A. Yes.

Mr. Monnett: I will mark that S.

Q. Take No. 10? A. No. 10, my son procured those.

The Court: I think you are wasting time.

Mr. Monnett: I would like to make the proof of these two, because under our rulings, if they required and they anticipated they did, they waived their rights.

The Court: The question would be on the competency of those to go in evidence.

Q. State to the jury after you examine them whether you can state that was the amount of wool that was sold to you and delivered to you and that was in the warehouse? A. This is part of it.

J. M. Scott.

Q. To that extent, it was in there? A. To that extent it is that much.

Mr. Monnett: We offer that in evidence.

Mr. Edmonds: We object on the following grounds: it is an attempt to show a waiver here by something other than an endorsement on the policy. Second, in view of the non-waiver agreement such evidence of waiver as here offered is incompetent. This is simply hearsay statements of the persons whose names here appear. The parties are not here for cross examination.

The Court: Exhibits 8 to 13 would not be competent to show what you are attempting to show. The witness is on the stand testifying. He may refer to this memorandum and state of whom he bought wool and when he bought it and the aggregate amount of wool he bought.

Q. After you examine that will you state to the court and jury of whom it was you bought and the quantity and about the time that it went into this warehouse? A. C. E. Knowles, 1395 pounds, July 11th, 1926. J. A. Young, 3170 pounds, Auguth 28th, 1925.

Mr. Edmonds: We object, it does not appear that this document refreshes his recollection.

The Court: Objection overruled and your exception may be noted.

The Witness: J. A. Young, 3170 pounds, August 28th, 1925.

Q. Does that refresh your recollection? A. Yes. W. B. Spooner, 790 pounds, July 14th, 1925. J. D. Collins & Sons, 1787 pounds, August 13th, 1925. John Lestock, 519 pounds, July 11th, 1925. C. E. Bundy, 452 pounds, July 11th, 1925. Herbert LePage, 398 pounds, July 7th, 1925. Garvin Brothers, 468 pounds, July 18th, 1925. S. Braut Bliss, 1200 pounds, plus, July 24th, 1925. J. W. Cellers, 410 pounds, 1925. W. G. Pryn, 240 pounds.

Q. Do you know these men personally as being the men from whom you bought this wool? A. I do; I know all those men personally.

Q. Take up any one of these others and state whether you got them or not, and state, after examining them, which ones you got? A. Some might be a little hard for me to read.

Q. Look them over, be careful about them and if there are any of those that you know personally about, state them and the amount of wool? A. J. B. Allison, 1869 pounds. I had forgotten the date but that was 1926. That was wool that I bought with my personal check.

J. M. Scott.

Mr. Edmonds: The defendants object; the witness is now obviously just reading the list, reading a list that he did not get.

The Witness: I secured this one.

The Court: He is testifying to a fact that he bought wool of these various parties and the quantities of wool. I do not know what may develop on cross examination.

The Witness: H. E. Kreight, 286 pounds, July 23, 1926. E. E. Buckey, 360 pounds, July 23, 1926. I procured all of those.

Q. Were those delivered to your warehouse? A. Yes; those were all bought in 1926.

Q. I call your attention to Exhibit No. 10, keeping them in order; examine that and state whether that refreshes your memory as to whether you bought of those people and that amount of wool was delivered to your warehouse? A. My son got this one but I know these men and I know about the wool.

Q. Give the amounts as near as you can? A. A. F. Crawford, 410 pounds, July 10th, 1925. E. L. Watson, 1250 pounds, August 10th, 1925. W. E. Davidson, 330 pounds, July 10th, 1925. E. L. Stewart, 660 pounds, August 8th, 1925. J. D. Nelson, 800 pounds, July 10th, 1925. E. R. Sims, 300 pounds, July 18th, 1925. W. C. Aikin, 703 pounds, July 10th, 1925. C. H. Ziler, 938 pounds plus on and after August 8th, 1925. D. S. McNutt, 954 pounds, July 11th, 1925. M. D. Wheeler, 105 pounds, July 11th, 1925. H. S. Johnson, 750 pounds, plus. He has that on after July 11th. J. C. Paisley, 450 pounds, July 18th, 1925. J. D. Paisley, 306 pounds, July 18th, 1925. Lewis McIntre, 600 pounds, July 18th, 1925. C. C. Johnson, 2250 pounds, July 18th, 1925. There is a name I can't get and it looks like "Flowers," 700 pounds, July 9th, 1925. J. C. Starrett, 525 pounds, July 11th, 1925. S. J. Alexander, 735 pounds plus, July 11th, 1925. I know all these men except that name there, I can't make out.

Q. Was this wool delivered to your warehouse? A. Yes.

Q. I call your attention to Exhibit No. 11 and will ask you to examine the names and amounts and refresh your memory and state to the jury, if you will, whether that was received in your warehouse and the quantities? A. This I got part and my son part.

Q. Do you know, after looking at that, that is the amount of wool that you received? A. Yes.

Mr. Edmonds: We object to the form of the question.

The Witness: James R. Spratt, 720 pounds, August 18th, 1925. S. R. Gregory, 340 pounds, August 28th, 1925. C. J. VanReeff, 240 pounds, July 11th, 1925. W. H. Pollock, 1310 pounds, July 11th, 1925. I. B. Wilson, 650 pounds, July 11th, 1925. There is a name I can't get, 966 pounds, August 28th, 1925. R. E. Watson, 1108 pounds, July 16th, 1925. W. W. Harris, 340 pounds, August 15th, 1925. E. E. Galloger, 1655 pounds, August 28th, 1925. S. J. Shepler, 900 pounds, July 11th, 1925. Carlos Cooper, 655 pounds, July 20th, 1925. W. C. Glass, 408 pounds, July 18th, 1925. W. S. McCracken, 550 pounds, July 20th, 1925. Wm H. Huffman, 2312 pounds, August 22nd, 1925. E. V. Few, 248 pounds, July 18th, 1925. That name, I want to state to the jury, I wrote myself with his authority. That is the only one I wrote. C. L. Reed, 680 pounds, July 18th, 1925. P. L. Warner, 387 pounds, July 11th, 1925. R. F. Clapper, 728 pounds, July 11th, 1925. John Harkness, 750 pounds, July 14th, 1925. George Echelberry, 376 pounds, July 11th, 1925. W. A. Johnston, 987 pounds, July 18th, 1925. G. W. Hupp, I don't get these figures, they look like 480 pounds, July 29th. J. W. Long, 615, August, 1925. There is no date only August.

Q. Did they deliver that quantity of wool? A. Yes, and that is all their own signature, as far as I know, on there.

Q. And is that part of the wool that was burned? A. Yes.

Mr. Edmonds: We move that the Court rule out the statement that is all in their handwriting.

The Court: That may remain in.

Mr Edmonds: Exception by each of the defendants.

The Witness: Elwood Laughlin, 1196 pounds, July 19th, 1926. John McCormac, 2081 pounds, July 12th, 1926.

(Narrative continued) Yes, I know those men and that wool was delivered to me and the amounts. I would like to make some explanation why. I have some wool in 1926 in there, and that is this, John E. McMurdy, I buy for a manufacturer by the name of John McMurdy of New York. I have a signed contract when I buy wool for him I can't buy for anyone else, but when I was not buying for him I had the privilage of buying for myself. That is why I got this wool in 1926. Sometimes he would stop me from loading up with more wool. I had a little over 82,000 pounds. I was paying 40 cents a pound at the time of the fire. The wool I had in the

warehouse at the time of the fire was worth 42 cents a pound, a little over $32,000.00. I am not positive just what wool bags are worth at the present time. At the time of the fire I think they were worth about 60 cents to a dollar apiece. There were 144.

Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the grounds heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exception noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said a while ago, through mud roads where he could not go by automobile.

The Court: Of course all we care for here is that they went around to the various farmers to find out how much wool they had purchased and of whom they had purchased it.

Mr. Monnett: There is another phase as to a certain line of authorities that if they had to spend time and money at their request that they are recognizing the existence of the policy and that is a question of estoppal if they ask them to do a certain thing.

The Court: You are not trying to recover for the expense?

Mr. Monnett: It is just a question of estoppel. It is in the record that this was done at the instance of the adjuster in order to determine how much wool was in that building which burned.

Q. How many days did that take, about? A. It took my son something like forty days; I did not spend that much time. I went by train and went out to the country and came back on the train. Mrs. Scott was in such a condition I did not want to stay away over night.

Q. I will ask if, in addition to this, you furnished in writing and under oath for each company, about October 4th, a notice of your loss? A. I did.

Mr. Monnett: Have you those originals that we served notice for you to produce?

Mr. Edmonds: He did not serve notice designating anything of that kind.

Mr. Monnett: We gave a very broad notice.

J. M. Scott.

The Court: Have you carbon copies of the letters that were sent?

Mr. Monnett: Yes, we have.

Q. I will ask you if you had prepared and sent on or about the 4th day of October, proofs of the notice of the loss by fire to these respective companies?

Mr. Edmonds: We object; the papers will speak for themselves.

The Court: Answer that by yes or no.

Mr. Edmonds: Exception.

The Court: The question is, did you on or about the 4th day of October send to the various companies who are defendants here proof of loss.

The Witness: Yes.

Q. Are these carbon copies of the same you swore to? A. I couldn't say as to the carbon copy part. They are copies of what I swore to.

Mr. Edmonds: These papers presented have a lot of other matter on them.

The Court: The memoranda does not have anything to do with the exhibit.

Mr. Edmonds: If your Honor please, we have and will produce the originals if you wish.

The Court: They asked you that awhile ago but you said it was not included in the notice.

Mr. Edmonds: It was not, but I offer to produce it anyway.

The Court: Let us have the originals.

Mr. Edmonds: Here they are, each one to a different company.

The Court: The one addressed to the Home Insurance Company may be marked Exhibit 14; the one addressed to the New York Underwriters Company Exhibit 15; the one addressed to the Westchester Fire Insurance Company Exhibit 16 and the one to the Sun Insurance Office or Company as Exhibit No. 17 and the other to the Norwich Insurance Company as No. 18. Those are proofs of claim, are they?

Mr. Monnett: Yes.

The Court: All dated October 4th.

Mr. Monnett: I think so, yes, received on October 18th, according to their stamp, 1926, Wm. N. Banent, General Adjuster. I do not think the record shows that we had formally offered the five policies, although they were admitted in the pleadings.

The Court: Yes, they have been offered and the Exhibits have been offered and admitted except 8 to 13

were excluded. 14 to 18 are the present items of business. Are you offering those?

Mr. Monnett: Yes.

The Court: They may be admitted.

Mr. Edmonds: Each of the defendants object to the introduction of Exhibits 14 to 18 inclusive upon the ground that the papers do not show compliance with the requirements of the policy.

The Court: The papers show what they show and they are useful in evidence up to the limit of what they show. If they are defective, that is another proposition. Your objection is overruled and exception noted.

Mr. Edmonds: Exception by each of the defendants.

And thereupon the proofs of loss sent to respective insurance companies were admitted in evidence on behalf of the plaintiff and are herewith submitted marked Plaintiff's Exhibits 14 to 18 inclusive and made a part hereof.

Q. The foundation structure, just describe the walls and what was the condition of those walls after the fire.

The Court: The foundation did not burn out?

Mr. Monnett: He says the way they were built there was a bigger draft because of being open on three sides.

The Court: It does not make any difference how much draft there was if it burned the building down.

Mr. Edmonds: The non-waiver agreement, is that in evidence?

The Court: The non-waiver agreement is in evidence.

Cross Examination.

By Mr. Edmonds:

Q. Mr. Scott, you have spoken, on your direct examination of a chattel mortgage which you executed to the Cumberland Savings Bank Company of Cumberland, Ohio. I hand you a paper which the stenographer may mark for identification as Defendant's Exhibit A, and will ask you to state whether that is the original chattel mortgage which you executed to the Cumberland Savings Bank?

A. Well, I would say it was because it is my hand write.

Q. That is your signature at the bottom? A. Yes.

Q. And your wife's signature? A. Yes.

Q. That is the original chattel mortgage to which you referred?

Mr. Monnett: We object to calling it the original chattel mortgage because it is not verified by the guaranty and under the statute it is void except between parties

and, so far as they are concerned, it is no mortgage at all. This has never been verified by the bank so they could not be held to complain.

The Court: I do not think we can regulate these claims. There is not anything before the court.

Mr. Monnett: The point I make is, if they are objecting that the real parties in interest should sue, they would not sue because they had no chattel mortgage to sue on.

The Court: We will pass that point.

Mr. Monnett: I want to save the record.

The Court: It has not been offered in evidence.

Mr. Monnett: It is a void chattel mortgage so far as the bank is concerned as against this insurance company. They would have to pay it to us in any event.

Mr. Edmonds: We offer defendant's Exhibit A as a part of the cross-examination of the witness.

Same objected to by the plaintiff.

The Court: It may not go in evidence.

Mr. Edmonds: On the ground of the order?

The Court: Yes. It is part of your own case.

Q. How much, at the time of this fire, was due from you to the Cumberland Savings Bank Company, Mr. Scott, on the indebtedness secured by this chattel mortgage? A. I said I thought about $19,000.00. I don't know exactly, maybe not quite that much, but in that neighborhood.

Mr. Edmonds: Will you produce the letter requested in our demand and subpoena duces tecum rejecting the proofs of loss in these companies?

(Here same is produced.)

Q. I hand you, Mr. Scott, Defendant's Exhibits B to F inclusive, which have been produced by your attorneys, and ask you to state whether, after you had submitted the sworn statements which you have identified as Exhibits 14 to 18 inclusive, whether, after you had submitted those statements to the insurance company you received these exhibits, B to F inclusive, from the several defendant companies in these cases.

Mr. Monnett: We object because they waived that by recognizing the existence of the policy and requiring this separate proof of loss as indicated in the testimony.

The Court: That objection will be overruled.

Mr. Monnett: Exception.

Q. The question is, whether you received these from the various companies? A. Yes, I received them.

J. M. Scott.

Q. And you received them about the dates that they bear, November 24th, 1926? A. I couldn't say as to that. I suppose I did. I couldn't say as to that.

Q. I call your attention to the registered date stamped on the backs of the envelopes attached to these Exhibits, the date of November 24th, 1926, and will ask you if that date stamp refreshes your recollection, approximately, as to when you received these letters? A. No, it does not refresh it, but I believe I received them according to that stamp.

Mr. Monnett: Same objection.

Mr. Edmonds: Defendants offer in evidence Exhibits B to F inclusive as a part of the cross examination of this witness.

Mr. Monnett: We object.

The Court: Objection sustained.

Mr. Edmonds: Again on the ground of the order?

The Court: Of the order. Those exhibits, however, I might say, should have been presented to the other side and gone in as part of the record in chief so that the whole of the case would be before the Court before the close of the testimony.

Mr. Edmonds: Our theory was, inasmuch as they had raised on direct examination the matters as to which these documents were pertinent it was proper for us to go into them on cross examination and therefore I offered them as part of the cross examination.

Mr. Murphy: The reason we did not, we did not know whether or not they were sufficiently identified and we have other evidence to identify them and that we were going to offer them in evidence.

The Court: It appears they have been sufficiently identified.

Mr. Murphy: They may be offered in evidence, then.

The Court: As part of the plaintiff's case?

Mr. Murphy: Yes.

Mr. Edmonds: That is, I understand, Mr. Murphy, then the record shows that the plaintiff offers in evidence Exhibit B—

The Court: No, the record shows that the plaintiff offers in evidence as a part of the examination of the plaintiff himself Exhibits 19, 20, 21, 22 and 23. 19 refers to the reply from the Home Insurance Company; 20 will be the New York Underwriters; 21 the Westchester Insurance Company; 22 the Sun Insurance reply and 23 the Norwich Union Fire Insurance reply.

And thereupon the papers above identified were ad-

mitted in evidence on behalf of the plaintiff and are herewith submitted marked Plaintiff's Exhibits 19, 20, 21, 22 and 23 and made a part hereof.

Mr. Edmonds: And this chattel mortgage, do I understand that they are also offering that?

Mr. Monnett: No, sir.

(Narrative continued) On January 1st, 1926, I had in this barn about seventy-two or seventy-five thousand pounds of wool. I kept all of that. The wool that I bought in 1925 I paid forty-five to fifty-three cents. The price of wool on the market at the time of the fire was forty-one to forty-two cents.

Q. So that if you had sold the wool which you had accumulated in the year 1925 at the market price of 1926 you would have stood to suffer quite a substantial loss, wouldn't you?

Mr. Monnett: You would have to determine the value, just what the value was, whether you lost or made.

The Court: I think that is so. If the price had gone up you would have made money and if it went down you would have lost money. That has not anything to do with the issue here that I can see. Objection sustained.

Q. How much wool did you purchase during the year 1926, up to September 6th, when this fire occurred, of your own? A. Six to eight thousand pounds—nine or ten—from six to ten thousand pounds.

Q. But you would not tell the jury any more definitely than that? A. I read off those names.

Q. I am not asking you that now. A. From six to ten thousand pounds.

Q. You cannot be any more definite?

Mr. Murphy: He has given it exactly.

The Court: He has reiterated it twice from six to ten. He said he had about eighty-two thousand pounds in at the time of the fire and he had from seventy to seventy-two thousand the first of January and he added enough to it to make the total of the eighty-two thousand, which he says was from six to ten thousand of his own.

(Narrative continued) I was not buying wool for the John McMurdy Company of New York in 1925. I began buying wool for them, I expect, about the first of June, 1926. I would say that in 1926 I purchased on behalf of the John McMurdy Company three hundred thousand pounds of wool. I did not put all of that in this barn when I purchased it. I put part of it in there. I did

business through this barn for John McMurdy Company in 1926. I had my own wool and I had McMurdy's wool in there in 1926. The tablet that I used for a record of the purchases made for John E. McMurdy was kept in the barn. But when I was buying for anyone else I always used a kind of a double precaution and I kept the record that had the names on, every man's name that I purchased from and the amount of pounds, I kept that in a bookcase at home. The tablet part of the record of the transactions for John E. McMurdy I kept in the barn. I counted up on the tablet and every Saturday I transferred that to a book. I kept that book in my house. I only used tablets for the records of my own purchases on my own account. I kept that in this barn and that was burned up in the fire. After the fire I didn't have anything to show for the receipts of the men who had the wool stored there. I had wool stored in there for other people, amounting to four thousand pounds, outside of McMurdy's wool. I just finished taking in seven hundred and some odd pounds of wool for McMurdy. That is all the McMurdy wool I had there, I took that in on Saturday afternoon. When I purchased this wool in 1925 I kept a separate bank account of my own purchases in the Government Savings Bank. The wool that I bought in 1925 I paid for most of it by check. If a man wants it for cash I give it to him. I am not able to produce the cancelled checks for those payments for the 1925 purchases, as they were burned in the fire. I also kept my bank checks in the barn; all my business was kept in there and I had my office in there in the northeast corner; took up about six foot square space. A box stall was in the opposite corner. There was about forty-one thousand pounds of wool on the first floor. About two-thirds of the floor space on the first floor was covered with wool, and went about ten feet high. The wool on the second floor went about nine feet high and covered very nearly a half of the floor space, not quite the half. Yes, it went up to the level where the roof began, went way above that, just about six feet up to where the level was and I said eight to nine feet. I know it was higher than I could reach up.

I talked to Mr. Harrod twice. It is true I said this morning that some one told me that he had been there, but I did not see him the first time. I saw him twice. I saw him when he came back to make the settlements

J. M. Bracken.

with these men that had this wool stored there, the second time I saw him.

It would be pretty hard to tell the average weight of each fleece of wool, one bag. I would say about eight pounds to the fleece. The average weight of the wool in the bags, per bag, all depends on the season of the year they bag it. When wool is bagged in the summer time, it is one thing. In the winter the grease is kind of frozen and it don't pack so tight. We have had many a car of wool that is over two hundred and eighty pounds, per bag. I loaded one hundred car loads this year and they averaged over two hundred and eighty pounds.

Re-Direct Examination.

By Mr. Monnett:

After I had prepared this statement for Mr. Harrodd he never called for it.

Q. I think they have put in this letter about the non-waiver agreement, so-called. Did the company ever name any arbitrator?

Mr. Edmonds: The defendants and each of them object to that question as wholly immaterial.

Mr. Monnett: They must do something more than to state that they are going to have an arbitrator.

The Court: May it be conceded here, then, that neither party has taken any action toward an arbitrator?

Mr. Monnett: Yes, they have tendered nobody, sent no name, and went no further.

The Court: Do you agree to that?

Mr. Edmonds: That is the fact, but we maintain it is an immaterial fact insofar as our not demanding an appraisal is concerned.

The Court: You claim it was up to the other side to start the proceeding and get it in motion?

Mr. Edmonds: Yes. The Supreme Court has so held, and I would be glad to submit the authorities on it.

Mr. Edmonds: That was after we had complied with their request and during the time that we were complying with their request.

And also:

J. M. Bracken

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is J. M. Bracken; I live in Cumberland, Ohio. I am from Cumberland, Guernsey County, Ohio. I am acquainted with J. M. Scott and knew him during the

J. M. Bracken.

year 1926. At that time I was cashier of the Cumberland Savings Bank. At the same time I was fire insurance agent. Those are my signatures at the bottom of Exhibits 1, 4 and 5. I issued those to Mr. Scott.

Q. Do you recall of Mr. Scott giving a chattel mortgage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage?

Mr. Edmonds: He asks, do you recall of Mr. Scott giving a chattel mortgage and we object; first, upon the ground that the evidence disclosed a dual agency here which, in no event, would impute knowledge to this company. Second, evidence tending to show knowledge to the agent is a violation of the parole evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exception by each of the defendants.

(Narrative continued.) At that time I attached the loss payable clause to those policies as agent for the company. I was not down at the fire that occurred there on September 6th; I was not at home. I was down there probably a week or ten days after. It was totally destroyed. I had been in the barn several times to see Mr. Scott on business. I have not the least idea of the amount of wool there.

Q. One or two stories of it?

The Court: Oh, yes; that is established, two stories to that building and a basement.

Mr. Monnett: Containing wool.

The Court: There were two stories that contained wool. It was piled up in the upper story and was stacked up in the lower story.

(Narrative continued.) I recall seeing Mr. Harrod at the bank about the 15th day of September. Mr. Stottsberry, the agent for an insurance company, and myself were with him. Mr. Scott was there, he came in afterwards. I think Mr. Harrod and Mr. Scott went out together, to my remembrance. I think they left together. I do not know whether they went over the losses together. These premiums on these policies were paid to me.

Mr. Edmonds: Which policies? He did not issue two of them.

L. A. Claypool.

Mr. Murphy: 1, 4 and 5 are under consideration and the money was sent to the company by you?

The Witness: Yes.

No cross examination.

And also:

L. A. Claypoole

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is L. A. Claypoole. I live in Cumberland, Ohio. I have lived there a little over eight years. I was living there during the year 1926 at or about the time Mat Scott's wool house burned. I am cashier of the Cumberland Savings Bank, the same bank that Mr. Bracken was in. I talked to Mr. Scott in the morning just after the fire.

Q. What, then, if anything, did you do in pursuance of that by way of communicating with the companies?

Mr. Edmonds: We object. What has this man got to do with the companies?

The Court: Nothing with the companies except that he may have transmitted a message on behalf of Mr. Scott to them. I do not know.

Mr. Monnett: They gave notice to the companies of the loss.

The Court: Who did?

Mr. Monnett: The bank.

The Court: For Mr. Scott?

Mr. Monnett: It does not make any difference who for. They gave notice of this fire. If they gave it I am entitled to that proof and they acted on it.

The Court: Notice that this witness would have sent to the insurance company at the request of Mr. Scott would be competent.

Mr. Edmonds: I did not understand the purpose of it.

Mr. Monnett: The purpose of it is to show that notice was sent in to the company.

The Court: He may testify.

The Witness: May I speak now.

The Court: Yes, it is your turn.

The Witness: Mr. Bracken, at the time of the fire, was on a vacation in Cincinnati and Mr. Bracken and I had been connected in business for about eight years and he usually entrusts a large part of the business to me in his absence and I notified the companies because Mr. Bracken was the agent of those companies and I did it for Mr. Bracken.

Foster Scott.

(Narrative continued.) The notice I gave was telegrams, notifying them of the fire of Mat Scott's wool house. I remember Mr. Harrod coming into the bank, I can't say as to the date. It was shortly after the fire. Mr. Scott, the plaintiff, was in there with him.

The Court: What is the mystery of this meeting at the bank at that time?

Mr. Murphy: I don't know that there is any mystery. We want to show that Mr. Harrod and Mr. Scott were there corroborating Mr. Scott's statement.

The Court: There is not any question about that.

Mr. Edmonds: Scott signed the agreement on that date, the non-waiver.

The Court: I think you have got that established.

No cross examination.

And also:

Foster Scott

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Murphy:

My name is Foster Scott. I am the son of J. M. Scott, the plaintiff in this case. I live near the Village of Cumberland. I was living there in September, 1926. I know about the condition of my father's wool barn about the 6th of September, 1926, or immediately prior thereto. I have seen it a great number of times. It was pretty well filled, not to capacity. I have seen it enough that I could give an estimate of the number of pounds of wool there was in there. I believe there was at least seventy-five thousand pounds of wool in the barn. I know a considerable number of the persons from whom my father obtained this wool, not all of them. I am not at all interested in that wool. I sold him some wool myself, fifty-two hundred pounds, I think, in round numbers. That was in 1926. I sold him in 1925 about three hundred pounds less than in 1926. There was an electrical storm at Cumberland, Ohio, on or about three-thirty to four o'clock A. M. September 6th, 1926. I did not see my father's barn burn when the fire was at its height. I seen it a few hours later. The fire was visible, almost visible from the country, from the farm where I lived. The last name on the paper called plaintiff's Exhibit No. 9 is my signature. I sold forty-four hundred and ten pounds of wool. That was in 1925.

Cross Examination.

By Mr. Edmonds:

I did not assist my father in securing any lists of

Victor Scott.

wool growers that had sold my father wool. I am a son.

The Court: That is, he is not the only son, is that what you mean?

There are other sons. Victor Scott did that.

And also:

Victor Scott

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Monnett:

My name is Mr. Scott. I am the son of the plaintiff, J. M. Scott. At the time of the fire in September, 1926, I was living at Cumberland, Ohio. I had lived there all my life. I have been working with dad ever since I was eight years old. In 1925 and 1926 I helped to put wool in that warehouse.

Q. I will ask you if you were asked by anyone or your father to gather any names on or about November 30th, 1926, of people who had put wool in the barn prior to the fire that was sold to your father, were you asked to do that?

Mr. Edmonds: To which each of the defendants objects.

The Court: We are only interested in the fact, did he do so.

Q. Did you do that? A. Yes, sir.

Mr. Edmonds: To which each of the defendants object on the ground that the non-waiver agreement——

The Court: The objection is overruled. We have an issue that the losses were not commensurate with the claim made by the plaintiff, as I understand. It is incumbent upon the plaintiff to show what the losses were.

Mr. Edmonds: We have to save our objection on this other point so far as it is pertinent to the other.

Q. I hand you some papers, marked Ehibits 9 to 13 and will you state to the Court and jury whether you had any knowledge of the collection of those names and the data thereon.

Mr. Edmonds: Same objection.

The Court: Same ruling.

Exception by each of the defendants.

The Witness: This paper here I know.

(Narrative continued.) That paper is No. 9. That paper, I practically went out for my father and got signed about every name that is on there. I rode in the rain and there is the rain blot on there as I went through the country. These other exhibits I got a name or two on that. I did not get Exhibit 11. I did not get

J. W. Spiker.

those two on Exhibit 13. I got practically all the names on that one,—that is 10. I didn't get any on 12. I guess I didn't get a name on that one, 8. I know those people personally that signed lists of the names 9, 10 and 11. It would be my judgment that was the amount of wool, substantially, that was delivered to the warehouse by those people. I bought some of it for my father. The amount I bought is represented on there by these names, and the amount on there is the correct amount I bought of these names, and that went into the warehouse that was burned. There were one hundred and forty-four sacks of wool on the lower floor, the first floor. Half of the third floor was filled with loose unwashed wool. I have been weighing, packing and hauling wool ever since I was nine years old. At the time of the fire there was seventy-five thousand pounds of wool in the first and second story. The market value of the wool on or about the 6th of September, 1926, at Cumberland was forty-one cents.

I was not present when Mr. Harrod was there. I was not present when Mr. Bracken or Mr. Stottsberry were there after the fire. I live in town. I did not have any connection with the wool. Father got me to help him the other day to make measurements of the barn. I was not there the day Mr. Harrod measured it.

No cross examination.

And also:

J. W. Spiker

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is J. W. Spiker. I live in Ava, Noble County, Ohio, probably four miles from the village of Cumberland, Ohio. I know J. M. Scott, the plaintiff in this action. I have had occasion to go to J. M. Scott's wool barn in the village of Cumberland, Ohio. I was there on Saturday before the fire. I was in the first and second story of the barn. I saw quite a bit of wool laying there on the first floor. I went from the first floor to the upstairs. There I saw quite a bit more wool, loose wool. Haslusky was the man I went there to see, he was selling his wool to Scott. The fire took place the next Monday morning, if I remember right.

No cross examination.

J. W. Cobert. Lee Glass.

And also:

J. W. Cobert

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is J. W. Cobert. I live in Cumberland, Ohio. I have lived there thirty years. I personally know J. M. Scott. I recall an occasion when he had a fire of what is known as his wool barn in the village of Cumberland; I was at that fire. I was at that fire awhile after it commenced to burn, about four o'clock in the morning and somewheres near there. When I first went there I saw this barn of Mr. Scott's burning. When I first went I didn't see anything but as the fire burned on I seen wool falling, burning. It was loose wool falling from this second floor. I stayed at the fire an hour or more, I suppose. During that time this wool was falling most all the time I was there. I seen wool falling, burning as it fell. I had not been at that barn prior to that fire. I had not been about the barn a week or two weeks before the fire. When I was at this fire I saw Mr. J. M. Scott, the plaintiff, around there.

No cross examination.

And also:

Lee Glass

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is Glass. I live in Cumberland, Ohio. I have lived there around thirty years. I know J. M. Scott, the plaintiff in this action. Yes, I remember the morning that he had a fire in his barn. Had quite an electrical storm the morning of that fire. That night or morning I was in bed. It was pretty severe, pretty severe shock on me. It aroused me. I live in the neighborhood of a thousand or twelve hundred feet, I think, from what is called the J. M. Scott wool barn that was burned up. After I was aroused I got up and went out on the porch and I went along the side porch to look in the direction of the report of the thunder and lightning where I got the location, it was right about in the middle of where the fire was. I went to bed and it was probably a half an hour, maybe more, before I saw a fire. His barn was all in flames when we got there. You could see wool burning there for several days. I would say it was three or four days after I saw this fire first that I saw wool burning.

No cross examination.

W. P. Smith. J. D. Collins.

And also:

W. P. Smith

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Joyce:

My name is W. P. Smith. I live in Reinersville, about twelve miles south of Cumberland. I am a farmer and a wool buyer. Sometimes I am a wool seller. I have been a wool buyer for thirty-three years. I bought wool in the vicinity of Reinersville, Morgan County and Noble County and also Washington County. I think the character of wool in the neighborhood where I have been buying wool compares very favorably with that in and about Cumberland. The reasonable worth of unwashed Delaine wool on the market in the vicinity of Trumbull County and Guernsey County, Ohio, on September 6th, 1926, was about forty-two cents. I did not buy any wool for Mr. Scott in 1926. I bought the wool for Scott in 1925. That is my name on Plaintiff's Exhibit No. 9; that handwriting is mine. That particular time I sold Mr. Scott 12,531 pounds. This wool was hauled from my place about October, 1925, to Cumberland for Mr. Scott. I remember of hearing of this fire of J. M. Scott's barn. I was never there.

Cross Examination.

By Mr. Edmonds:

I bought this wool in 1925 on Mr. Scott's account; I bought it for Mr. Scott. I paid fifty cents for it for him. The price of wool generally was much higher in 1925 than it was in 1926; that is a fact. It was going down considerably in 1926 over what it was in 1925, about eight cents on the pound, from eight to ten cents owing to the quality. That would be true of September 6th, 1926.

And also:

J. D. Collins

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Monnett:

My name is J. D. Collins. J. D. Collins and Son signature on Defendant's Exhibit 8, is mine. I know J. M. Scott, the plaintiff in this case. I have known him about twenty years. I sold him 1780 pounds of wool in August, 1925. That went to his warehouse on a back street, back of the garage. I was in the warehouse in 1926. I was in the warehouse three or four days before the 19th of August. I was in the building a good many

times, I could not just tell the size. I know it had two stories. I was in the second story about a week before the fire, three or four days before the 19th of August. I observed a big pile of wools on the second floor and the lower floor full of sacks of wool. I did not pay any attention what the wool sacks ran per pound. I do not know just what wool and wool in sacks in Cumberland on or about September 6th, 1926, was selling at, but I know what I got for mine in August. In August, 1926, I got forty-one cents. I saw the fire after it fell in. I could not say how soon after the fire that I saw the building. I live two miles out in the country. When I got the word we went down the road and it was pretty bad, the building all fell in. I did not hear any thunder that night. I live two miles from Cumberland. It looked to me like wool burning, like wool when it went down. A pile of stuff there.

And thereupon the plaintiff rested.

Mr. Edmonds: At the conclusion of all of the evidence offered by the Plaintiff, the Defendants, The Home Insurance Company, the Norwich Union Fire Insurance Company, the New York Underwriters Insurance Company, the Sun Insurance Office and the Westchester Insurance Company, separately and severally move the Court to strike from the record and exclude from the consideration of the jury the evidence offered by the Plaintiff tending to show knowledge on the part of Bracken of the existence of the chattel mortgage.

Also evidence tending to show knowledge of Stottsberry of the existence of the chattel mortgage.

Also to strike from the record and exclude from the consideration of the jury the evidence offered of the alleged statement by Harrod to the plaintiff requesting him to secure a list of names of owners or sellers of wool and testimony as to statements claimed to have been made by Harrod to the plaintiff as to the effect of such statements if obtained.

These motions are made severally and separately upon the ground, first, that the evidence offered as to the knowledge of Bracken and Stottsberry, the soliciting agents, violates the parol evidence rule. Second, that it disregards the limitation of authority of agents contained in the policies limiting the authority of agents to change or alter the contract of insurance except by written endorsement thereon, and finally upon the ground that, as to Bracken the evidence shows that he was at the same time local soliciting agent for three of the companies in suit, defendants in these suits and was at the same time cashier or assistant cashier——

The Court: Do you mean that incapacitates him because he was an officer of the bank from being an agent of the insurance company?

Mr. Edmonds: It is an additional reason why his knowledge would not be imputed to the company and would not bind the company.

The Court: You claim then that if his knowledge otherwise could be imputed to the company that because he was an officer of the bank it could not be imputed?

Mr. Edmonds: Yes, that is the point.

The Court: I might say with a good deal of confidence at this time that I do not think there is anything in that theory. The big question that you are saving is, whether or not, notice to him was notice to the company That is your point and that is an open question.

Mr. Edmonds: I would like an opportunity to submit the authorities. The question also is raised on the motion for a directed verdict which I wish to make at this point. I did not know whether the Court wished to pass on the exclusion of the evidence at this time.

The Court: The motion is made and is subject to a ruling. Have you any other motion?

Mr. Edmonds: Yes. Now come the defendants, The Home Insurance Company, the Norwich Union Fire Insurance Society, The New York Underwriters Insurance Company, the Sun Insurace Company Lmtd., the Westchester Fire Insurance Company, and at the conclusion of all the evidence offered by the plaintiff and separately and severally move the Court to direct the jury to return a verdict in favor of the several defendant Insurance Companies in each of the cases here involved, severally and separately, upon the grounds:

1. As to the suits against the Home Insurance Company, The Norwich Union Fire Insurance Society, Ltd., and Sun Insurance Office, as defendants:

There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. As to all five of the suits in trial.

The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as

a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defence.

And thereupon the further hearing of this case was adjourned until Thursday morning, June 14, 1928, at nine thirty o'clock A. M.

Thursday Morning Session.

June 14th, 1928.

Mr. Monnett: The plaintiff makes a motion that the Court submit the question to the jury on the evidence and instruct the jury to return a verdict for the plaintiff on the same grounds heretofore named, to-wit, that they did not tender back before the suit or any other time the amounts paid for the respective premiums.

The Court: That motion is overruled and exception is noted.

Let the record show that the plaintiff's case is opened for the purpose of receiving additional proof in order to complete the record, and that is the document which is marked Exhibit No. 24.

And Be It Further Remembered, That the plaintiff to further maintain the issues on his part to be maintained introduced and offered in testimony the following evidence, to-wit:

Mr. Monnett: We desire to tender in evidence this document which is marked Exhibit No. 24.

The Court: Are there any remarks?

Mr. Edmonds: No.

The Court: It is admitted.

And thereupon the document above offered was admitted in evidence on behalf of the plaintiff and is herewith submitted marked Plaintiff's Exhibit No. 24 and made a part hereof.

And thereupon the plaintiff rested.

And thereupon the defendants and each of them severally renewed their motion as heretofore set out at the time the plaintiff first rested, for directed verdicts in favor of the several separate defendants upon the following grounds:

1. As to the suits against The Home Insurance Company, The Norwich Union Fire Insurance Society and the Sun Insurance office, as defendants:

There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. As to all five of the suits in trial:

The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. As to all five of the suits in trial.

The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

The Court: The matter submitted to the Court at this time is upon the motions of the defendants, severally, to direct a verdict for the various reasons appearing in the motion made on the record. The chief and primary question raised by that motion is as to the effect of a condition which is common to all five of the policies, having to do with the necessity for the reformation of the policies because of a loan on the subject matter of the personal property made in the nature of a chattel mortgage. The principal part of the discussion is that point that is raised in the motion.

In the arguments there have been cited a great number of cases both in the State of Ohio and from the United States Courts, and from the Court of Appeals, particularly, of the Sixth District in which we are primarily interested.

The rule in Ohio is announced and settled by the decision in the 101st Ohio State, which is distinguished from the case in the 82d Ohio State. The subject of the property insured in that case is real estate and the question arose because there was a defective title to the real estate. The Court held, in general terms, that the Statute 9586 of the General Code, referred to the authority of insurance agents, and knowledge by the agent, brought knowledge to the insurance company in that case and the insurance company was bound. That, of course, was later followed and very recently followed by the case reported in the October Monthly Law Bulletin known as the Glass case and the subject matter in that case referred to a mortgage on chattel property, personal property. So that there can be no question about the rule in Ohio.

Now the rule in Federal Courts is and has been from time immemorial, as well as elsewhere, that parole evidence is not admissible to vary the terms of a written contract. Upon that principle of law I think it may be stated that the decision of the Sixth Circuit Court of Appeals was made in the Hartford Insurace Company against Nance and Jones. As I have heretofore remarked, those holdings, and that decision, seem to be at odds with the rule laid down by the Court of last

resort in Ohio, and that is because those two cases distinguished between questions arising in connection with the validity of the contract itself and questions arising which have to do with the rule of property which is the subject matter of the particular insurance. The Court of Appeals put that in a category which must be decided under the statutes of the given state and decisions of the court of last resort of that state and they further distinguish the cases beore them as applying to the other class which has to do and is related to the general law of jurisprudence, and questions of that nature must follow the United States Federal decisions. To fortify their position and decision in that respect they have cited some several decisions of the United States Supreme Court.

So that, taking the Federal decisions of this Circuit and analyzing them in the light and along with the decisions of the Ohio State Supreme Court upon the same subject, the distinguishing features which I have mentioned are very apparent and are very plain and clearly drawn so that we may say from a Federal standpoint that the law having to do with the validity of the insurance contract is referable to the State law, and the law having to do with the rule of property governing the subject matter of insurance is also referable to State law and that other questions that bring themselves forth under the category of the general law of jurisprudence are referable to the holdings of the United States Courts, both Supreme and subordinate.

We have before us proof that has been admitted, and admitted under objection, some of it admitted upon the theory that the Court might later find it necessary to withdraw it from the consideration of the jury if there were no jury questions. So far as this one question is concerned that relates to the evidence that was offered and received temporarily in reference to the chattel loan and the chattel mortgage and what was done by the insured and by the bank from whom he made his loan and gave his chattel mortgage and the local insurance agents in regard thereto; and it developed that in three of the policies, namely, 1, 4 and 5, the insured informed the local agents—two local agents involved, one of whom was an officer of the bank where the insured transacted his business and made his loan. Of course, that particular agent was cognizant of the loan because he made the loan as an officer of the bank, and what the insured did was to notify him of the loan and also notify the agent of the companies of the loan that had to do with

policies 2 and 3. Those agents knew necessarily of the loan. There can be no question about that. The only question about it is whether it is proper evidence to be produced from the witness stand under the parole evidence rule. What transpired in reference to a chattel mortgage that was consummated in the execution and delivery of what is now known as Plaintiff's Exhibit 24, is related to a rule of property. It is called in the pleadings a chattel mortgage.

It is a written document. Is it a chattel mortgage? An inspection of the document itself discloses the fact that there is no statement or claim as is made mandatory by the statute of the State of Ohio. A further inspection of the Exhibit itself discloses the fact that there are no file marks on it, that the injunction of the statute that the proper officer endorse the time when it is filed and the date when filed and that it was filed, are altogether wanting on this document. Furthermore, the interpretation of those sections of the statute, General Code of Ohio, by the Supreme Court of the State of Ohio is to the effect that a chattel mortgage, or a document of that kind does not rise to the dignity of a chattel mortgage for the reason that it cannot operate against creditors and it simply remains a contract between the parties to it without, in any way, affecting the rights of other parties. If it is a contract between the so-called and named mortgagor and the so-called and named mortgagee in the document itself by which an undertaking is made by the mortgagee to furnish so much money, and an undertaking is made by the so-called mortgagor to grant a lien upon certain personal property, that will be good in the hands of the parties themselves as against the rights of all creditors, general and special, it becomes merely a collateral contract the same as the giving of a promissory note, and had to do with the rule of property, and it is governed by the law of the State of Ohio and the decisions of the State Courts.

Furthermore, by giving notice of the loan that was to be made shows on the part of the insured the lack of any attempt to commit any fraud upon the insurance company and no doubt the transaction was handled between the insured and the insurance agents as a chattel mortgage and no doubt what the insurance agents did on behalf of the insured was to protect these insurance policies because of that loan. There is no question about that. So that the evidence that has been introduced here relative to the wording contained in the riders upon

those three insurance policies and the facts that are offered surrounding that transaction is not parol evidence to vary the terms of any written contract but simply parol evidence to interpret the language used on those riders, and the non-effect of this transaction as a chattel mortgage must be held to be a rule of property governed by state laws, and governed by the laws of the State of Ohio and the decisions of the State of Ohio and because that is so the cases of the Hartford Insurance Company against Jones, and Hartford Insurance Company against Nance are, to the extent I have indicated, non-applicable to the issues that we have before the Court here. The waiver agreement, or the non-waiver agreement as to the terms according to the construction that I have been able to put upon it is simply a stop-cock. It is a paper which the adjuster sought and received the signature of the insured to hold matters in status quo until an examination could be made of the enormity and quantity of the loss, and there is not any agreement here between the parties about which to disagree. The evidence on that subject in general terms is something like this: The adjuster came, sought an interview with the insured, accused him in broad terms of burning down the property and told him what he would have to do before they would have the material on which to base proof of loss. To that the assured acceded and immediately started to work to get the information together. Later, and within sixty days, as provided by the policies, proof of loss was forwarded to the insurance companies. After some little time, after the company had digested, presumably, or made an examination of those proofs of loss it sent word to the insured that the parties are under disagreement about the claim for loss. That is all that was done. There was no negotiation about it. There was not any conference about it. They set off in their respective offices out there, respective head offices in the east, and sent word back to this insured that the parties disagreed, and, therefore, it is claimed here at this time in the orderly trial of this law suit that the insured is deprived of his remedy and what he should have done was to have erected and constructed a board of arbitration and secured the decision of a board of arbitration on the value of all of this property. It does not appear whether that should be with the consent or the non-consent of the insurance companies. We do not know. But that is what is claimed, that he should have done and before bringing suit. That was incumbent upon him and necessary for him to do as a step of

Mr. I. Edwin Stottsberry.

development precedent to bringing suit. My own notion is that an insurance company cannot sit off in an isolated manner of that sort and allow matters to drift to an unreasonable time and thus claim in a Court of Law that the Court has not any jurisdiction over the suit because the insured did not do thus and so. I do not think the failure to offer to tender back insurance premiums would have anything to do with the issue before this Court at this time unless it be as a very slight element related to the question of estoppel. There is not very much in this record on the question of the non-tender of insurance premiums. Whatever there is in the record will remain in and cannot be prejudicial to the interest of either or any party. The conclusion is, that the motion to direct a verdict may be overruled and the motion to withdraw testimony offered which was objected to at the time by the defendants and admitted over the objection of the defendants, that motion may be also overruled and each of the defendants may have exceptions to the rulings of the Court on each of the motions. You may call the jury.

Mr. Edmonds: To all of which rulings each of the defendants severally except.

Mr. Edmonds: May I just say one word, Your Honor, as to the chattel mortgage proposition that the law of Ohio would govern. We have not had an opportunity to present to Your Honor the law of Ohio as to the effect of that chattel mortgage so signed is a defense and we would like to do so, if Your Honor would care to hear from us.

The Court: No.

Be It Remembered, That the defendants, to maintain the issues on their parts to be maintained, introduced and offered in testimony on their behalf the following evidence, to-wit:

Mr. I. Edwin Stottsberry

called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. Edmonds:

My name is I. Edwin Stottsberry, and I live at Zanesville now, formerly lived at Cumberland; and was a local agent in 1926 at Cumberland for the New York Underwriters Insurance Company and the Westchester Fire Insurance Company, and as such agent countersigned the two policies, Plaintiff's Exhibits 3 and 2. The fire occurred on the 6th of September, 1926, to the property described in these policies.

"Q. State whether or not until after that fire occurred you ever had any knowledge that any of the wool described in these policies was encumbered by chattel mortgage.

Mr. Monnett: Wait. I thought that was out of the issue. There is no chattel mortgage.

The Court: Let him answer the question. Of course it is out of the issue.

"A. It was not clear in my mind that way. I did not understand that there was a mortgage on it.

Mr. Monnett: Inasmuch as they have not shown any chattel mortgage we object to it at this time.

The Court: Objection overruled and exception noted."

No cross-examination.

Mr. Edmonds: Each of the defendant insurance companies rest.

And thereupon each of the defendant insurance companies rested.

Mr. Edmonds: At the conclusion of all of the evidence——

The Court: You wish to reiterate your motion?

Mr. Edmonds: There is no rebuttal?

Mr. Monnett: He did not claim there was a mortgage, he just said he didn't know there was any.

Mr. Edmonds: Now come each of the defendant insurance companies, The Home Insurance Company, The Norwich Union Fire Insurance Society, The New York Underwriters Insurance Company, the Sun Insurance Office, The Westchester Fire Insurance Company and each severally move the Court to direct the jury to return a verdict in favor of each several defendant insurance company on the following ground:

1. That the evidence, without dispute, and the pleadings and admissions therein establish violation of the condition prohibiting the chattel mortgage contained in the policies and that no evidence of facts constituting waiver or estoppel to assert this defense has been offered.

2. Upon the ground that the evidence, without dispute, establishes that subsequent to the fire in question the plaintiff and each of the defendant insurance companies severally disagreed as to the amount of loss caused by the fire in question to the property described in each of the several insurance contracts, and that the amount of the loss has never been ascertained by appraisal and that there is no evidence in the case of facts

constituting waiver or estoppel against the insurance companies or any of them to assert this defense.

3. Upon the ground that the evidence, without dispute, establishes that three of the insurance contracts in suit, namely, the policy of the Home Insurance Company, the policy of The Norwich Insurance Society and the policy of The Sun Insurance Office contain loss payable clauses making the laws, if any, in case of fire, payable not only to the plaintiff but also to the Cumberland Savings Bank and Trust Company and there is a non-joinder of necessary parties plaintiff in these actions and the same are not brought by the real party in interest.

The Court: That motion, as made, may be overruled, and the defendants, respectively, have their exceptions to the ruling of the Court.

Mr. Edmonds: To all of which rulings each defendant severally excepts.

Mr. Monnett: We ask the Court to instruct the jury to bring in a verdict for the plaintiff for the full amount with interest from the date of the fire against each of the insurance companies, full amount of the policy with interest from the 6th day of September, 1926, as the evidence now stands.

The Court: The motion of the plaintiff may be sustained with modification and limitation.

The jury may be instructed to return a verdict upon policies 1, 4 and 5 and the motion as it applies to policies 2 and 3 may be held in suspension until the court submits to the jury the request for a special verdict upon the question of notice to the agent of the respective insurance companies holding policies 2 and 3.

Gentlemen of the Jury, the view taken by the Court upon a number of questions——

Mr. Edmonds: I would like to except to the Court's ruling in sustaining the motion for the reasons:

1. There is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee as to the cases based on policies payable to the bank, e. g. the cases against the Home Insurance Company, The Norwich Union Fire Insurance Society, Ltd., and the Sun Insurance Office.

2. In all the cases: The evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases: The evidence and pleadings without dispute establish a disagreement between plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

Mr. Edmonds: I understand the Court announced that he would sustain the motion so far as policies 1, 4 and 5 are concerned.

The Court: You may have your exceptions right now or later.

Exceptions noted.

As I started to say, the questions submitted to the Court at the close of the plaintiff evidence were such that a great many, or practically all the questions that arise, according to the Court's view of the issues in the five cases that we are trying, are issues addressed to the Court and not to the jury. In other words, they are issues of law other than issues of fact and that is the reason for the sustaining of the motion in reference to three out of the five cases which are before the Court. And, as I said, I desire to submit to the jury a request for a special verdict upon the question as to whether or not the local agent of the insurance companies, under policies numbered 2 and 3, and which are the policies of The New York Underwriters Company and of The Westchester Fire Insurance Company, of whom the last witness that was on the witness stand was the local agent and secured policies from the insured, whether or not that agent had notice of this loan. Now, we have before us the evdence of some witnesses who testified upon this subject, that is, the question whether Mr. I. E. Stottsberry, the agent, knew of, and was apprised of the fact that it was contemplated to take a chattel mortgage on this wool; that is, the local bank to take a chattel mortgage upon the wool from the owner of the wool, the plaintiff in the case, Mr. Scott. The agent himself has been on the stand for the defendants and his testimony for the defendant is all the testimony and all the facts which you have from the standpoint of those two defendants, and he testified that he did not understand it that way, or you will remember what he said in that regard. The question for you to determine, and the only question for you to determine, is whether the agent, the local agent, Mr. Stottsberry, had notice of the contemplation of taking a loan upon this wool by a so-called chattel mortgage and that the loan was made.

In solving this problem you will cast the burden of

proof upon the plaintiff and the plaintiff must satisfy you by a preponderance of the evidence, that is, the greater weight of the evidence, not necessarily the greater number of witnesses, but the greater weight of the evidence, and you are the sole judges of the weight which you will give to the evidence of any witness and all the witnesses.

The credibility of witnesses is a matter for your sole solution. You may believe all a witness has said or nothing he has said or a part of what he has said and disregard the remainder of what he has said, as unworthy of belief. That is what credibility means. Just worthiness of belief.

I think you understand that the only issue that is put up to you is that of a special verdict to ascertain that fact. You may retire.

The clerk will furnish you with the blanks in order for you to perform your duty. That means that I have just put up to you that one question. As soon as you have solved it you may report it back into Court. You may retire.

Mr. Edmonds: The defendants except to the statement of the Court that there were witnesses who testified that Stottsberry knew it was contemplated to take a loan.

The Court: You except because that is plural instead of singular?

Mr. Edmonds: Yes.

The Court: Gentlemen of the jury, objection has been made to the statement of the Court to you in the instruction where I used the language that witnesses had testified in reference to the notice of the agent Stottsberry. That objection is, I am told, because I made it plural. It is plural or singular, depending upon what you find about it.

Mr. Edmonds: And the defendants in the presence of the jury each except to the Court's charge to the jury that knowledge of the agent would be material, either of a chattel mortgage theretofor obtained, or of a chattel mortgage proposed to be obtained in the future, to that each of the defendants except for the reason that the evidence upon that point is immaterial and constitutes a violation of the parol evidence rule and disregards the limitation of the agent's authority contained in the insurance contracts.

And the defendants object and except to the admission of the special verdict to the jury on that issue.

The Court: Exceptions may be noted and you may retire, gentlemen.

And thereupon the jury retired and afterward brought in a verdict against the two companies.

The Court: The special verdict of the jury having been returned the motion of plaintiff insofar as it applies to the two defendants, The New York Underwriters and The Westchester Fire Insurance Company, being undisposed of, it is the conclusion of the Court that the principal sum of each of those policies are recoverable by the plaintiff and verdicts may follow accordingly, and thus the motion, as originally made, is now sustained as to each defendant and the jury instructed to return the verdicts.

Mr. Edmonds: To which each of the insurance companies except on the same grounds as heretofore stated in the motions made for directed verdicts in favor of the respective insurance companies and also upon the ground that the Court is without jurisdiction to determine the amount due but that the matter should be submitted to the jury to determine the extent of the loss and the amount due, if any, under each defendant's respective policy.

Mr. Monnett: Interest is computed from the date of the fire, the day that the loss occurred.

Mr. Bibbee: No.

The Court: That is right? That is what you sue for, is it?

Mr. Edmonds: You did not put that in the form of an instruction.

The Court: That would necessarily follow.

Mr. Edmonds: Our position is that the policy provides that it is not payable until sixty days after proof of loss or award of appraisals therefor and until payable it could not draw interest.

Mr. Monnett: We consent to put in remitturs, if that computation is wrong.

Mr. Edmonds: Each of the defendants except to the order of the Court in directing verdicts for the full amount of each policy with interest from the date of the fire for the additional reason, in addition to the reasons heretofore stated, that the policies provide that they are not payable until sixty days after proofs of loss are furnished or until sixty days after the award has been rendered when required and that interest upon any amount due under the several policies would not, therefore, begin to run until sixty days after proofs of loss were rendered or until sixty days after the award

had been rendered where an appraisal has been required as in these cases.

Now comes each of the defendants and severally except to the action of the Court in directing the jury to return verdicts in each of these cases in favor of the plaintiff for the same reasons stated in support of the motions for directed verdicts made on behalf of each defendant, namely:

1. In the cases in which The Home Insurance Company, The Norwich Union Fire Insurance Society Ltd., and the Sun Insurance Office are defendants, there is a non-joinder of necessary parties and the suits are not brought in the name of the real party in interest because of absence of the bank which is payee.

2. In all of the cases the evidence and pleadings establish without dispute incumbrance by chattel mortgage without consent thereto endorsed on the policies and there is no evidence of facts constituting waiver or estoppel in law.

3. In all of the cases the evidence and pleadings without dispute establish a disagreement between the plaintiff and each defendant as to the amount of the loss and the amount of the loss has not been ascertained by appraisal as required as a condition precedent by the policies and there is no evidence of waiver or estoppel to assert this defense.

4. That the court had no jurisdiction to determine the amount due.

5. That the amount for which the court instructed the jury to return verdicts in each case is excessive.

The jury then retired and thereafter returned into court with its separate verdicts in favor of the plaintiff and against the several defendants in accordance with the direction and instructions of the Court as appears from the record herein.

Thereafter, within three days after the rendition of said verdicts defendants each filed their separate written motion for new trial and to set aside the separate verdicts against them for the reasons and upon the grounds set fort has appears of record herein, all of which motions the court on consideration, thereafter overruled, and did render separate judgments on said separate verdicts against the several defendants and in favor of the plaintiff as appears of record herein, to all which actions and rulings of the court the several defendants, at the time severally excepted.

And now, in furtherance of justice, and that right may be done, the defendants present the foregoing as their

Narrative Form Bill of Exceptions taken in the trial of the above causes, a true and correct copy of the evidence verbatim and of this Narrative Form Bill of Exceptions each having been heretofore lodged herein with the Clerk of this Court, which they pray the Court may be allowed signed and sealed and ordered to be made a part of the record in these causes. And it appearing to the Court that the defendants have given to the plaintiff due notice of such lodgment, and no objections having been filed thereto by the plaintiff, the Court find that the said narrative statement of evidence and the exhibits attached hereto and made a part hereof is all of the evidence offered or received on the trial of the above entitled causes and is correct in all respects, and is properly prepared, does therefore approve, settle and allow the same; and said statement having now been approved by this Court it is hereby ordered that the foregoing Narrative Form Bill of Exceptions be filed in the office of this Court and become part of the record herein and settled and allowed, signed and certified by the Judge as provided by law, all of which is accordingly done on this twenty-second day of September, 1928.

In testimony whereof, the undersigned, the judge of this Court who presided at the trial of said causes has hereunto set his hand this 22 day of September, 1928.

Approved:

Benson W. Hough,
Judge of the United State District Court for the Southern District of Ohio, Eastern Division.

Approved:

James Joyce,
F. S. Monnett and
Elwood Murphy,
Counsel for Plaintiff.

.....,
Counsel for each Defendant.

PLAINTIFF'S EXHIBIT No. 1.

No. 173

Stock Company.
The Home Insurance Company
New York
Organized 1853.

Amount $8000. Rate $1.27. Premium $101.60.

In Consideration of the Stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the sixth day of July 1926, at noon, to the sixth day of July, 1927, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said

struction of additional stories to any building herein building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the fore-

going stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents: but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do;

but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quanti-

ties not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days'

notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the

title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises

endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company, shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 2.

No. 21023. Stock Company.

New York Underwriters Insurance Company

Amount $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage, by fire, except as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Exhibits.

Uniform Standard Ohio — Form No. 212 (Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situate West side of Cambridge St., Book No. 50 Map No. 117½, City Town of Cumberland, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 21023 of the New York Underwriters Insurance Company of New York City

City.

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio—786.

A. R. Stoddart, Secretary. R. M. Bissell, President.

Exhibits.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed

hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this

policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and

shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

Exhibits.

insured and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 3.

No. 969337. Organized 1837.

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $74.00.

In Consideration of the Stipulations herein named and of Seventy-four & No/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the first day of April 1926 at noon to the first day of April 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '24)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated west side of Cambridge street, Book No. 50 City Town of Cumberland, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit.

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for

more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 969337 of the Westchester Fire Insurance Company of New York.

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated April 1, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following

stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation, and is issued under and in pursuance of Sections 130, 131 and 132 of the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, President.

Countersigned at Cumberland, Ohio, this 1st day of April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable

time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of

the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

Exhibits.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, cover-

ing any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for

a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 4.

No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office		U. S. Branch
63 Threadneedle St.		54 Pine Street,
London, Eng.		New York.
Amount $5750.	Rate 1.27	Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June

Exhibits.

1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to

keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 228271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberlan Ohio Agency.

Dated June 14th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio, subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office Chicago Ill.

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascer-

tainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom

of trade or manufacture to the contrary notwithstanding), there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, un-

less duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing

by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its

part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to

such provisions and conditions no officer, agent, or representative shall have such power or deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,
Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland O., this 14 day of June 1926.

J. M. Bracken, Agent.

PLAINTIFF'S EXHIBIT No. 5.

No. 223. Stock Company. $5750.

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch No. 75 Maiden Lane, New York
Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire except as hereinafter provided, To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the

insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio, State of Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured

in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland O Agency. Dated June 24th 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June, 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

Exhibits.

By their Attorney duly authorized.

Hart Darlington, Manager.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the

insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed

hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this

policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and

shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

PLAINTIFF'S EXHIBIT No. 6.

(Package of cinders or ashes of burned wool, and is attached to bill of exceptions, but omitted from printed record by stipulation.)

PLAINTIFF'S EXHIBIT No. 7.

Non-Waiver Agreement

It Is Hereby Mutually Stipulated And Agreed that any action taken by the Insurance Company, or Companies, signing this agreement in ascertaining the amount of loss and damage which occurred Sept 6 1926 to property located in rear lot W/S of Cambridge St., Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of Insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.

In The Event of the failure of the parties hereto to agree as to the amount of said loss and damage, the question of the amount thereof shall be determined by apprisal, as provided in the conditions of the policies of Insurance.

Notice is hereby given and accepted, and it is hereby mutually understood and agreed, that no representative of any Insurance Company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing.

The Sole Object And Intent of this agreement is to provide for the determination of the amount of said loss and damage, and an investigation of the cause thereof, without regard to the liability of said Insurance Companies, and to preserve all the rights of all the parties hereto.

Exhibits.

Witness our hands in duplicate, this 15 day of Sept 1926.

J. M. Scott
Companies in interest.
A. C. Harrod, Adjuster.

Witness:
I. E. Stottsberry,
J. M. Bracken.

EXHIBIT No. 14.

To The Home Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.

Policy No. 173
Amount of Policy — $8000.00
Rate — 1.27
Premium — $101.60

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool

or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of The Home Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $8000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $20,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Exhibits.

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.
Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.
Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge Street, Book No. 50. Town of Cumberland.

No. 173

Stock Company
The Home Insurance Company
Organized 1853.

Amount $8000. Rate 1.27 Premium $101.60

In consideration of the stipulations herein named and of One Hundred & One & 60/100 Dollars Premium, Does insure J. M. Scott for the term of one year from the sixth day of July, 1926, at noon, to the sixth day of July 1927 at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Eight Thousand Dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

Exhibits.

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Exhibits.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming a part of Policy No. 173 of the Home Insurance Company New York

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 173 of the Home Insurance Co. New York.

Name of Insurance Company

issued at its Cumberland O Agency. Dated July 6th, 1926.

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist

or be claimed by the insured unless so written or attached.

In witness whereof this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized agent of the company at Cumberland, Ohio.

Wilfred Kurth, Secretary. E. G. Snow, President.

Countersigned at Cumberland, Ohio, this 6th day of July, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establi-

ment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but

liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions

and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the

amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the

loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 15.

To the New York Underwriters Insurance Company, New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 21023
Amount of Policy—$3500.00.
Rate —1.27
Premium $44.45

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor

Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of New York Underwriters Insurance Company, New York, of its proportion of the above loss, under said policy, the sum of $3500.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $24,500.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at

Exhibits.

Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio

Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building occupied as wool storage, situated west side of Cambridge street risk #50 map 117½.

Exhibits.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.
Uniform Standard Ohio Form No. 212
(Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½.

No. or Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.
Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.
Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

Exhibits.

No. 21023. Stock Company.
New York Underwriters Insurance Company
New York
Amount $3500.00. Rate $1.27. Premium $44.45.

In Consideration of the Stipulations herein named and of Forty-four & 45/100 Dollars Premium, Does Insure J. M. Scott for the term of one year from the 14th day of August, 1926, at noon, to the 14th day of August, 1927, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Thirty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.
Uniform Standard Ohio
Form No. 212.
(Edition June '25)

Wool Form
(For Use on Either Fire or Tornado Policies)

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated west side of Cambridge street, Book No. 50 Map 117½ City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described, is hereby made to cover in such attached and communicating additions and sheds to said

building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 21023 of the New York Underwriters Insurance Company of New York City

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated August 14th, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or

conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio—5786.

A. R. Stoddard, Secretary. R. M. Bissell, President.

Countersigned at said Agency this 14th day of August, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Exhibits.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by

order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

Exhibits.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish

a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or

condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 16.

To the Westchester Fire Insurance Company, of New York.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. 969337
Amount of Policy—$5000.00.
Rate 1.48
Premium—$74.00.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage on premises owned by me.

Exhibits.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Westchester Fire Insurance Company, of New York, of its proportion of the above loss, under said policy, the sum of $5000.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $23,000.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B."

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were

a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"

Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212
(Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while

Exhibits.

contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

Exhibits.
Wool Form.

No. 969337. Organized 1837.

Westchester
Fire Insurance Company
Of New York

Amount $5000.00. Rate $1.48. Premium $74.00.

In Consideration of the Stipulations herein named and of Seventy-four & No/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the first day of April 1926 at noon to the first day of April 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio Form No. 212
(Edition June '24)

Wool Form
(For Use on Either Fire or Tornado Policies)

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage situated West side of Cambridge Street Book No. 50 City Town of Cumberland. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building; all only while in transit to and from said building.

Other insurance permitted.

Alterations and Repairs Permit
(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and

the insurance, if any hereunder, on contents of any building here described, is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and when not in violation of any law, statute or municipal restriction, to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 969337 of the Westchester Fire Insurance Company of New York

Name of Insurance Company

issued at its Cumberland, Ohio Agency. Dated April 1, 1926.

I. E. Stottsberry, Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation, and is issued under and in pursuance of Sections 130, 131 and 132 of the Insurance Law of the state of New York.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cumberland, Ohio.

H. H. Clutia, Secretary. Geo. R. Crawford, President.

Countersigned at Cumberland, Ohio, this 1st day of April, 1926.

I. E. Stottsberry, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any

material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein de-

scribed, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of

fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this

policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured, for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 17.

To the Sun Insurance Office, Western Department, 76 West Monroe St., Chicago, Ill.

Cumberland, Ohio, Oct. 4, 1926.
Policy No. C 288271.
Amount of Policy—$5750.00.
Rate — 1.27
Premium—$73.02

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story

slate roof, frame building occupied for wool storage on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Sun Insurance Office, Western Department, of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the

conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
223	Norwich Union Fire Insurance Society Ltd.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.

Uniform Standard Ohio — Form No. 212 (Edition June 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also

Exhibits.

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street Risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Exhibits.

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.
No. C 288271.

Sun Insurance Office
Established A. D. 1710.

Head Office
63 Threadneedle St.
London, Eng.

U. S. Branch
54 Pine Street,
New York.

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth day of June 1926 at noon to the fourteenth day of June 1927 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to policy.

Uniform Standard Ohio Form No. 212
(Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated West side of Cambridge Street risk No. 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, im-

provements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office London England.

Name of Insurance Company

issued at its Cumberland Ohio Agency.

Dated June 14th 1926 19.....

J. M. Bracken, Agent.

Uniform Standard Ohio Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the

assured shall be payable to the assured and The Cumberland Savings Bank Co. Cumberland Ohio.
subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 288271 of the Sun Insurance Office, Chicago Ill.

Name of Insurance Company

issued at its Cumberland, Ohio, Agency. Dated June 24th, 1926.

J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if

the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage

by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained

shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the

amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, pri-

vate or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation. "Provided that the Capital, Stock, Funds, and Property, of the Company shall alone be answerable in respect of any claim made under this policy, and the only liability of the Shareholders shall be to contribute to the Funds of the Company the amounts unpaid on the shares held by them respectively."

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid

Exhibits.

until countersigned by the duly authorized Agent of the Company at Cumberland O.

P. T. Kelsey,

Manager of the United States Branch of the Sun Insurance Office.

Countersigned at Cumberland, O. this 14 day of June, 1926.

J. M. Bracken, Agent.

EXHIBIT No. 18.

To the Norwich Union Fire Insurance Society Ltd., 75 Maiden Lane, New York.

Cumberland, Ohio, Oct. 4, 1926.

Policy No. 223.

Amount of Policy—$5750.00.

Rate — 1.27

Premium—$73.02.

By the policy of insurance above, a copy of which, with all descriptions, schedules, endorsements, transfers and assignments thereon is attached and annexed hereto, you insured me (J. M. Scott), of which due written notice was given you heretofore.

A fire occurred on the 6th day of September, 1926, about 4 o'clock A. M., and according to my best judgment and belief, the fire originated by lightning striking the building in which my wool and wool bags were stored, as is set forth in said policy, being a two story slate roof, frame building occupied for wool storage, on premises owned by me.

The said building containing said wool and wool bags was occupied at the time of said fire for storage of wool, wool bags, frames for sacking wool, scales for weighing wool, a cupboard containing books and tablets on which records were kept for the storage of said wool and wool bags, and for no other purpose, except my son, Victor Scott, had log chains and a few other pieces of personal property in said building, of which I am unable to give a description.

Said wool and wool bags described belonged at the time of said fire to me, and no other person or persons had any interest therein, except a chattel mortgage given on forty thousand five hundred pounds of the same to The Cumberland Savings Bank Company, of Cumberland, Ohio, which provided that loss should be payable to said Company.

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No assignment or transfer or incumbrance on said wool or said wool bags has been made, and no change in the title, use, occupancy, location or possession of said property has occurred since the issuing of said policy, except said chattel mortgage to said The Cumberland Savings Bank Company, of Cumberland, Ohio, as above stated.

The whole insurance, whether valid or not, covering any of said property involved at the time of said fire was $28,000.00, and no more.

The actual cash value of the property described by the aforesaid policy at the time of fire was $28,757.60.

The actual loss and damage to said property by said fire, as shown by statement attached hereto, marked Schedule "A" was $28,757.60.

Claim is hereby made of Norwich Union Fire Insurance Society Ltd., of its proportion of the above loss, under said policy, the sum of $5750.00.

In addition to the sum insured by said policy on said property, there was other insurance thereon to the amount of $22,250.00, all of which is specified in Schedule "B", together with a copy of the descriptions and schedules in policies thereof, all of which are hereto annexed and made a part hereof. There was no insurance on said property other than your said policy and the insurance specified in Schedule "B".

Said fire did not originate by any act or design or procurment on the part of me, J. M. Scott, this affiant; nothing has been done by me or by anyone with the privity or consent of me, J. M. Scott, this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or annexed schedules but such as were a part of or in the building damaged or destroyed, and belonged to and in possession of me at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made.

In witness whereof, I have hereunto set my hand at Cumberland, Guernsey County, Ohio, this 11th day of October, 1926.

J. M. Scott,
Assured.

State of Ohio, County of Guernsey, SS.

Personally appeared before me on the day and date above written, J. M. Scott, the signor of the foregoing statement, who made solemn oath to the truth of the

Exhibits.

same, and that no material fact is withheld, of which the said Insurance Company should be advised.

B. F. Enos,
Notary Public.

[Notarial Seal.]

Schedule "A"
Statement of Loss.

Date of Loss.	Assured.	Address.
September 6th, 1926.	J. M. Scott.	Cumberland, Ohio.

List of property destroyed.	Cost	Value	Loss	Claim
At least 70,000 pounds of unwashed wool.	$34,800.00	$28,700.00	$28,700.00	$28,700.00
144 wool bags..	$ 144.00	$ 57.60	$ 57.60	$ 57.60

Schedule "B"

No. of Policy	Name of Company	Amount Insured	Amount Claimed
C 288271	Sun Insurance Office, New York.	$5750.00	$5750.00

Date of Insurance—June 14th, 1926.
Uniform Standard Ohio Form No. 212
(Edition June 1925)

Wool Form.

$5750.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
173	The Home Insurance Company, New York	$8000.00	$8000.00

Date of Insurance—July 6th, 1926.
Uniform Standard Ohio Form No. 212
(Edition June 1925)

Wool Form.

$8000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also

cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage, situated west side of Cambridge Street risk #50 map 117½. Town of Cumberland, Ohio.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
21023	New York Underwriters Insurance Company, New York.	$3500.00	$3500.00

Date of Insurance—August 14th, 1926.

Uniform Standard Ohio Form No. 212 (Edition June 1925)

Wool Form.

$3500.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge St., Book No. 50, Map No. 117½. Town of Cumberland.

No. of Policy	Name of Company	Amount Insured	Amount Claimed
969337	Westchester Fire Insurance Company of New York.	$5000.00	$5000.00

Date of Insurance—April 1st, 1926.

Uniform Standard Ohio Form No. 212 (Edition June, 1925)

Wool Form.

$5000.00 On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story approved roof frame building, occupied as wool storage, situated west side of Cambridge street, Book No. 50. Town of Cumberland.

No. 223. Stock Company. $5750.

Norwich Union
Fire Insurance Society Ltd.
Norwich England

United States Branch No. 75 Maiden Lane, New York

Amount $5750. Rate 1.27 Premium $73.02

In Consideration of the Stipulations herein named and of Seventy Three & 02/100 Dollars Premium Does Insure J. M. Scott for the term of one year from the fourteenth

Exhibits.

day of June 1926, at noon, to the fourteenth day of June 1927, at noon, against all direct loss or damage by fire as hereinafter provided. To an amount not exceeding Five Thousand Seven Hundred & Fifty Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Form No. 212 attached to Policy.

Uniform Standard Ohio — Form No. 212 (Edition June '25)

Wool Form

(For Use on Either Fire or Tornado Policies)

$5750. On wool, including bags; and, provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust, or on commission, or sold but not delivered; all only while contained in the two story slate roof frame building, occupied as wool storage situated West side of Cambridge street risk 50 Map 117½ City Town of Cumberland, Ohio. This item shall also cover said merchandise within one hundred (100) feet of the above described building while on sidewalks, streets, alleys, yards, detached platforms and in or on vehicles or railway cars; also on said merchandise while on platforms in contact with the above described building.

Other insurance permitted.

Alterations and Repairs Permit

(This Clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

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Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of Wool Storage State kind of business and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Lightning Clause.

(This Clause void when attached to Tornado Policy)

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York.

Name of Insurance Company.

issued at its Cumberland, Ohio, Agency. Dated June 14th 1926.

J. M. Bracken, Agent.

Uniform Standard Ohio. Form No. 111

Loss Payable Clause

Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co. subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society New York

Name of Insurance Company

issued at its Cumberland, O. Agency. Dated June 24th 1926

J. M. Bracken, Agent.

This Policy is made and accepted subject to the foregoing stipulations and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition added hereto, and as to such provisions and conditions of this Policy except such as by the terms of this Policy

may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, the Norwich Union Fire Insurance Society Ltd, has executed and attested these presents, this fourteenth day of June 1926.

This Policy shall not be valid until countersigned by the duly authorized agent of the Company at Cumberland, Ohio.

By their Attorney duly authorized.

Hart Darlington, Manager.
J. M. Bracken, Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any

fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

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This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short

rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building hereby described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and

specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost; at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one; and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this

policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

EXHIBIT No. 19.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Home Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #173 of the Home Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered

policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Home Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,

Home Insurance Company

By A. C. Harrod,

Adjuster.

EXHIBIT No. 20.

Western Adjustment and Inspection Company

Branch Office

F. W. Sparrow, Manager

Hartman Building

Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,

Cumberland, Ohio

Dear Sir:

The New York Underwriters Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #21023 of the New York Underwriters Insurance Company for loss said to

have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but it is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The New York Underwriters Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the papers purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
New York Underwriters Insurance Co.
By A. C. Harrod,
Adjuster.

EXHIBIT No. 21.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Westchester Fire Insurance Company has referred to the undersigned for reply the type-written statement

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purporting to be sworn to by you wherein claim is made by you under Policy #969337 of the Westchester Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Westchester Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereon caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Westchester Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 22.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Sun Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #C 288271 of the Sun Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Sun Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Sun Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 23.

Western Adjustment and Inspection Company
Branch Office
F. W. Sparrow, Manager
Hartman Building
Columbus, Ohio

November 24th, 1926

Mr. J. M. Scott,
Cumberland, Ohio
Dear Sir:

The Norwich Union Fire Insurance Company has referred to the undersigned for reply the type-written statement purporting to be sworn to by you wherein claim is made by you under policy #223 of the Norwich Union Fire Insurance Company for loss said to have occurred by fire on the 6th day of September, 1926.

If this paper is intended by you as compliance with the requirements of this company's above numbered policy for a sworn statement known as proof of loss, you are hereby advised that the same cannot be accepted but is hereby rejected as not complying with the requirements of this company's above numbered policy for the following, among other, reasons:

1. For the reason that the same does not state your knowledge and belief as to the time and origin of the fire;

2. Said paper does not state your interest and that of all others in the property;

3. Said paper does not state the cash value of each item thereof and the amount of loss thereon,

all as required by the terms and conditions of this company's above numbered policy. The Norwich Union Fire Insurance Company disagrees with you as to the amount of loss or damage caused by the fire in question to the property described in this company's above numbered policy and takes the position that the sound value of the property and the amount of loss thereto caused by said fire were each very much less than the amounts stated in the paper purporting to be sworn to by you.

Said paper is held by the undersigned subject to your order and control.

Reserving to this company all of its rights in this matter and waiving none of the terms and conditions of this company's above numbered policy,

Very truly yours,
Norwich Union Fire Insurance Company
By A. C. Harrod,
Adjuster.

EXHIBIT No. 24.

Know All Men by These Presents: That J. M. Scott, Grantor in consideration of the sum of Eighteen Thousand Two Hundred Dollars to me paid by The Cumberland Savings Bank Company, Cumberland, Ohio, a corporation, Grantee the receipt of which is hereby acknowledged, do.. hereby Bargain, Sell and Convey to the said Grantee their successors and assigns, the following described goods and chattels, to-wit: Being Forty Thousand five Hundred pounds of wool stored in barn located at rear of lot on west side of Cambridge Street, Cumberland, Ohio.

The Condition of this Conveyance is such that if the said J. M. Scott, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said The Cumberland Savings Bank Co., the sum of Eighteen Thousand Two Hundred Dollars, represented by various promissory notes of various dates and amounts and signed by said J. M. Scott, by Sarah R. Scott, and by both, then this conveyance shall be void; otherwise it shall be in full force.

It is further agreed that if default be made in the above conditions, or any part thereof, or if any secreting, or removal from their location, any abuse, or misuse, any sale, any seizure whatever by any process of law of said goods or chattels, or of any part of them, be either made or attempted by said mortgagor.., or by any person or persons claiming under ..... or in behalf of either, or by or in behalf of any creditor or creditors of said mortgagor.., or if from any other cause the security shall become inadequate, then said mortgagee.. or successors may take immediate possession of said property, or of any part thereof, wherever found, and sell same at public or private sale, for the highest price ..... can obtain, and pay indebtedness and expenses. And it is further agreed that said mortgagee.. or successors may insure said property for ..... benefit, during the continuance of this mortgage, and at the expense of said mortgagor.., the cost of said insurance to be secured by this mortgage; and further, that in default of payment of said money, or any part thereof, then said mortgagee.. or successors may sell said property at public or private sale, for the highest price ..... can obtain, and shall apply the proceeds of said sale to the payment of said indebtedness and interest thereon, and of all reasonable and necessary costs, including the cost of filing, recording and refiling this mortgage, and said costs of insurance, and shall pay the residue, if any, to said mort-

gagor.. or successors. Otherwise said property is to be and remain in the peaceable possession of said mortgagor.. or legal representatives.

And the said mortgagor hereby covenants and agrees to, and with said mortgagee, his executors, administrators and assigns, that he is the true and lawful owner of the above described property, and has good right to sell, convey and incumber the same; and that the same is free from all incumbrances whatsoever.

In Witness Whereof, the said J. M. Scott and Sarah R. Scott, his wife have hereunto set their hands this 19 day of June A. D. 1926.

J. M. Scott
Sarah R. Scott.

Hazel Scott
L. A. Claypool

STIPULATION—Filed September 22, 1928.

The proposed bill of exceptions in the above entitled actions which by order of the Court were consolidated for the purpose of trial and tried in one trial having been duly presented by counsel for defendants and the same having been examined and allowed by counsel of both parties hereto by agreement, it is therefore stipulated and agreed that the foregoing Bill of Exceptions is correct and that it contains all the evidence offered and received and a correct reference to all the exhibits introduced and true and correct copies of the same and of all the proceedings had on trial of said cause.

It is further stipulated that this Bill of Exceptions as engrossed be settled, allowed, and signed by Honorable Benson W. Hough, Judge of said Court, in accordance herewith.

It is further stipulated and agreed between all parties to each of the above entitled causes that Plaintiff's Ex-

Notice of Appeal.

hibit 6, which consists of cinders of burned wool, because of the impossibility of printing same, need not be printed as a part of the record in any of the above entitled causes, but that the said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party.

F. S. Monnett,
Attorney for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendants.

NOTICE OF APPEAL—Filed September 22, 1928.

The Home Insurance Company, of New York, the defendant, hereby gives notice to the plaintiff, J. M. Scott, that it appeals from the judgment entered in this cause.

Mooney, Bibbee & Edmonds,
Its Attorneys.

Waiver

J. M. Scott, the plaintiff herein, hereby acknowledges service upon him of the foregoing written notice of appeal, waives the issuance, or service upon him, of any further notice of appeal or citation, and enters his general appearance herein for all purposes of appeal; Bond demanded. No waiver as to time.

J. M. Scott,
Plaintiff,
By F. S. Monnett,
His Attorney.

PETITION FOR APPEAL—Filed September 22, 1928.

To the Hon. Benson W. Hough, Judge, of the United State District Court, for the Southern District of Ohio, Eastern Division, Aforesaid:

Now comes The Home Insurance Company, of New York, defendant herein, by its attorneys, and respectfully shows that on the 15th day of June, 1928, the jury duly impaneled, by direction of the Court, found a verdict against your petitioner and in favor of the above named plaintiff and upon said verdict a final judgment was entered by this court in favor of the plaintiff on the 7th day of August, 1928, against your petitioner, the defendant herein, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of errors which is filed with this petition.

Your petitioner, the defendant herein, further respectfully says and shows that this is an action for recovery upon a policy of fire insurance issued by the defendant, your petitioner, to the plaintiff, J. M. Scott; and that this is an action in which a direct review of the decision of the United States District Court may not be had in the Supreme Court of the United States under Section 238 of the United States Judicial Code, or Title 28, Section 345, United States Code Annotated, as amended by the act of February 13th, 1925; that this case is one in which, under the legislation (Section 128 of the United States Judicial Code or Title 28 Section 225 of the United States Code Annotated of 1928) in force when the act of January 31st, 1928 was passed, a review could be had in the United States Circuit Court of Appeals, Sixth Circuit, on writ of error to said judgment of the United States District Court.

Your petitioner feels itself aggrieved by the aforesaid verdict and judgment entered thereon as aforesaid, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit and prays for reversal of said judgment and hereby petitions the court for an order allowing it to prosecute an appeal to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided for the correction of errors so complained of and herewith assigned, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals and that an order may be made fixing the amount of security to be given upon said

Assignment of Errors.

appeal by your petitioner, the defendant herein, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings and the execution of the judgment may be suspended, superseded and stayed and that a supersedeas be issued until the determination of said appeal by said United States Circuit Court of Appeals for the Sixth Circuit.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

[Duly verified.]

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Petition for Appeal.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed September 22, 1928.

Now comes the defendant in the above entitled case, The Home Insurance Company, in connection with its petition for appeal, and makes and files the following assignment of errors which it avers occurred upon the trial of this action and upon which it will rely in the prosecution of its appeal to reverse the judgment of this honorable court:

1. The Court erred in entering judgment in favor of the plaintiff and against the defendant for the sum of Eight Thousand Nine Hundred Twenty-two dollars and sixty-six cents ($8,922.66) and costs, or for any sum.

2. The court erred in its order overruling the defendant's motion for a new trial, and in each ground thereof, to which order the defendant then and there excepted.

3. The court erred in its order overruling the defend-

ant's motion at the close of plaintiff's case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

4. The court erred in its order overruling the defendant's motion at the close of all of the evidence submitted in the case that the court direct the jury to return a verdict in favor of the defendant, to which ruling of the court the defendant then and there excepted.

5. The court erred in overruling the motion made by the defendant at the conclusion of the statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the statement of the case by plaintiff's counsel upon the ground that upon the statement of the case by plaintiff's counsel the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

6. The court erred in overruling the motion made by the defendant at the conclusion of the reply statement of the case by plaintiff's counsel to render judgment in the case in favor of the defendant upon the reply statement of the case by plaintiff's counsel upon the ground that upon the reply statement of the case made by plaintiff's counsel, separately and combined with the original statement, the plaintiff was not entitled to recover, to which action by the court the defendant at the time excepted.

7. That the verdict of the jury and the decision and judgment of the court are contrary to the law and the evidence.

8. That the verdict of the jury and the decision and judgment of the court are manifestly against the weight of the evidence.

9. That the verdict of the jury and the decision and judgment of the court are not sustained by sufficient evidence or by any evidence submitted in the case.

10. There was error and abuse of discretion in the order of the court in consolidating this action for trial with four other actions pending in this court, to which the defendant at the time objected and excepted.

11. The court erred in directing the jury to return a verdict for the plaintiff, to which action by the court the defendant at the time excepted.

12. The court erred in not submitting to the jury the issue as to the amount of the loss, to which the defendant at the time excepted.

13. The court erred in admitting in evidence and refusing to rule out on defendant's motion testimony of

the plaintiff to the effect that the premium paid by the plaintiff for the policy in suit had not been tendered back by the defendant to the plaintiff before or after this suit, to each of which rulings the defendant at the time excepted, including the following testimony:

Q. I will ask you whether any of these premiums have ever been tendered back to you either before or after this suit?

Mr. Edmonds: We object on behalf of each defendant upon the ground that it is wholly immaterial and irrelevant in this case.

The Court: With respect to each defendant, the motion is overruled and exceptions noted.

The Witness: May I answer?

Q. Yes, I thought you had answered?

A. No, now you put your question. (Question read.)

The Witness: No, they have not.

Motion by counsel for defendants to rule the answer out upon the ground that there is no obligation of the insurance companies to return the premium.

The Court: Motion overruled and exceptions noted."

14. The court erred in admitting in evidence testimony of the plaintiff that the defendant or its agents did not cancel or tender back anything to cancel a former policy issued by the agent, to which ruling the defendant at the time excepted, including the following testimony:

"Q. After you notified him on August 14, 1926, of the chattel mortgage upon this wool, did he cancel or tender back anything to cancel the former policy of which he was the agent of April 1, 1926?

Mr. Edmonds: Objection by each of the defendants upon the ground there is no obligation and it is immaterial.

The Court: Objection overruled; exceptions noted.

The Witness: He did not."

15. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, to which ruling the defendant then excepted, testimony of the plaintiff to the effect that the soliciting agent who countersigned the policy in suit knew that the plaintiff was giving, or had given, a chattel mortgage on a part of the wool described in the policy, including the following testimony:

"Q. Now, I call your attention to what are known as the Stottsberry policies; first, I will take up Exhibit No. 2, the New York Underwriters Insurance Company policy for $3500.00, which does not have any loss payable

clause upon that, and the same state of facts as to Exhibit No. 3, the Westchester Fire Insurance Company, which does not have any loss payable clause upon that, you may state what, if anything, at the time either of the policy being executed April 1, 1926, of Exhibit No. 3, the Westchester, and on policy of the New York Underwriters, dated August 14, 1926, as to there being a lien, a chattel mortgage on this wool, and if any notice was given to these parties?

Mr. Edmonds: We object, if your Honor please, on behalf of each defendant insurance company, upon the ground, first, that the evidence proposed to be offered is a violation of the parol evidence rule, undertakes to change by oral testimony the written contract of the parties; second, I might say, in that the policy expressly provides that except by written endorsement on the policy and consent be given to an incumbrance by chattel mortgage, the entire policy shall be void, whereas, the evidence proposed to be offered is that the policy should be valid, notwithstanding no written endorsement, but by simple oral evidence that the agent had knowledge when the policy was issued. The second ground of objection is that these insurance contracts contain an express provision limiting the power of agents and representatives of these defendant companies to change or alter the conditions of the policies, except by written endorsement thereon.

The Court: Is that all?

Mr. Edmonds: Those are the grounds.

The Court: The objection made and the grounds and the reasons for the objection having been noted in the record, the evidence will be received at this time, subject, of course, to any later ruling of the court.

The defendant's exceptions may be noted.

(Question read.)

Q. (Continuing) Or other agents? A. I told Mr. Stottsberry when I got that $3500.00 policy that I had given the Cumberland Savings Bank a chattel mortgage for the amount of money that I borrowed from them. Now, let me just—

Q. You are talking now, which one are you referring to? A. The $3500.00 policy.

Q. Go ahead? A. Now, I told Mr. Stottsberry that, he was down at his home at the time, it was on Saturday. He asked me if I wanted the policy right away, he said, 'If you do, I will go to the office'. He had company at home; his office was in the First National Bank of our town. I said, 'No, it isn't necessary, you can write it

out Monday morning and mail it, so I will get it through the mail; I am away from home during the week, and I will send you a check for the money', which he did.

Mr. Edmonds: Motion to rule out the answer and each part thereof, on the ground that it is a violation of the parol evidence rule.

The Court: You don't have to restate these reasons, we haven't time to listen to any dissertation upon it each time. Your motion to exclude the answer is overruled and your exceptions are noted, for the reasons announced in the objection to the question.

Q. I will ask you the same question, as to what, if anything was said to I. E. Stottsberry, the agent's name appearing at the bottom of the policy, Exhibit No. 3, Westchester Fire Insurance Company, as to there being any encumbrance or chattel mortgage on this wool?

Mr. Edmonds: Objection on the same grounds.

The Court: The same objection is made to this question as the former, and the same reasons announced, and the court overrules the objection and the exceptions of the respective defendants are noted in the record.

A. Well, I didn't never say anything only what I said to him when I got the $3500.00 policy, that I had given the Cumberland Savings Bank Company a chattel mortgage of the amount of money I had borrowed from it on a certain amount of wool about forty some thousand pounds of wool, I think over forty thousand, speaking from memory.

Motion by counsel on behalf of each defendant to rule the answer out.

The Court: Motion overruled and exceptions noted.

Q. The conversation you had as to Exhibit No. 2, as I understand you, was about the date of the policy, which was August 14, 1926, is the same I. E. Stottsberry that is on the same policy? A. Yes, I think, Mr. Monnett, possibly the conversation took place on Saturday, and I expect that policy will be dated on Monday, I remember very well I went down to his home, it was on Saturday evening.

Q. Had that lien existed on there up as early as the other policy, April 1, 1926? A. No, sir."

and including the following testimony of J. M. Bracken:

"Q. Do you recall of Mr. Scott giving a chattel mortgage to your bank? A. Yes.

Q. You knew of that, did you? A. Yes.

Mr. Edmonds: Each of the defendants object.

The Court: To the giving of the chattel mortgage?

Mr. Edmonds: He asks, do you recall of Mr. Scott

giving a chattel mortgage and we object; first, upon the ground, that the evidence disclosed a dual agency here which, in no event, would impute knowledge to this company. Second, evidence tending to show knowledge to the agent is a violation of the parol evidence rule. It would nullify the provisions in the policy limiting the authority of the agent to change or alter contracts of insurance except by written endorsement thereon.

The Court: Motion overruled; exceptions by each of the defendants."

16. The court erred in admitting in evidence and refusing to rule out on motion of the defendant, the testimony of the plaintiff as to conversation between plaintiff and A. C. Harrod—who signed the non-waiver agreement on behalf of the insurance companies, including defendant—after the non-waiver agreement was signed and as to the examination of the premises made after the fire by said Harrod and as to the requests and demands claimed to have been made by A. C. Harrod of the plaintiff that the plaintiff obtain a list of the farmers from whom the plaintiff claimed to have purchased the wool which the plaintiff claimed was damaged by the fire in question; and as to the claimed statement of Harrod that he would come back and check up with the plaintiff some time and that nothing further would be required of the plaintiff and that there would be no trouble; and that they would have a settlement and that in the meantime plaintiff would get a form such as was usually sent out but that the plaintiff should pay no attention to that; and that the plaintiff should go right ahead and gather up this wool; and the testimony that he procured the data claimed to have been requested by said Harrod; and the testimony that said Harrod did not call for any statement prepared by the plaintiff, including the following testimony:

"Q. State what was said by this adjuster, between you further, as to the fire, give it in order the best you can from start to finish?

Mr. Edmonds: We object to that as immaterial.

The Court: The conversation between him and the adjuster?

Mr. Edmonds: As to the fire, that is the question. Now, the parties have agreed—they haven't offered it in evidence yet, but identified it—the parties agreed whatever was done in the investigation of this fire and fixing the amount of the loss should not be a waiver of the condition of the policies.

The Court: That will depend on the interpretation of

the language used in the non-waiver. Your objection is that that bars any conversation between the representative of all three companies and the gentleman here that thought he was insured; is that right?

Mr. Edmonds: Insofar as the conversation purports to be intended as a waiver of the conditions of the policy, and if not, that is wholly immaterial here.

The Court: I think we will receive the conversation between the two parties in suit in this case, subject, of course, to its later being withdrawn from the jury if any legal reasons appear in the development of the case why it should be. Your objection may be overruled and exceptions noted."

and including the following testimony:

"Q. What happened then? A. We went to the porch of our home and sat down there, and he began to tell me what they would require of me, require me to go back to these farmers—

Mr. Edmonds: Each defendant objects, if your Honor please. This evidence now is intended solely for the purpose of attempting to constitute a waiver or estoppel on the part of the insurance companies.

The Court: The same objection as before?

Mr. Edmonds: Yes, let me state the ground, on the ground that policies prohibit waiver or alteration, except in writing, that these parties had also entered the non-waiver agreement, which also precluded an oral waiver.

The Court: We are going to hear the story as a basis for this discussion, and then we are going sometime in the dim future to pass upon these questions. The objection is overruled, and you can save your exceptions.

Q. What requirement did he then make of you. A. He asked me, he said, 'Scott, you have to have something to show this wool was in this barn and consumed, you will have to go to these farmers and get it from them. You can remember them'. I says, 'I will do the best I can', I says, 'I have bought from two or three hundred farmers, I can't just remember when I got or where I got this wool after my last shipment'. I had bought before this and shipped several carloads the same season. He said, 'You can remember'. I says, 'It is a pretty big thing', I says—I told him I would do the best I could.

"Q. Did you tell him how you would have to go about it? A. I told him the roads were in such a condition I would have to go by horse and buggy, as I didn't ride horse back any more myself. I told him I would do the

best I could and depend largely on memory and my son where we got this wool.

Motion by counsel for defendants to strike the answer out on the same grounds; same ruling; same exception.

"You may state to the jury— A. I haven't told you all. Q. Go ahead? A. Then he says, 'Well, Scott, I wouldn't know any way to say but the one, you have to'. He says, 'It is like this, these insurance companies have to tell the directors the same as a bank has to, and they have to have something to make a proof of loss'. 'Well', I says, 'I recognize that fact, but,' I says, 'Wouldn't my oath amount to something in its'? He said the oath wouldn't do. I says, 'I will still say what I said prior to this, I will do the best I can'. I says, 'I don't know how soon I can do it; we will go right at it. I will go and see my son and go at it'. I says, 'The roads are in such a condition, we can't travel by automobile'.

"Q. Unimproved roads?

"A. Yes, unimproved roads. He says, 'that is about all that can be done until you get proof of loss, and I will come back and check up with you sometime'. I wasn't satisfied with what he was requiring of me, and I walked away, out to the sidewalk, and walked on the sidewalk to the corner of our lot under a shade tree and talked to him a bit. I said, 'Mr. Harrod, if I get these seventy thousand pounds or upward of wool gathered up as proof, is there anything else you require of me'. and he says 'No'. He says, 'You get that gathered up, Scott, and there will be no trouble; we will have a settlement'. He says, 'In the meantime you will get a form like that we usually send out, but you pay to attention to that, you go right ahead and gather up this wool'. I says, 'I will do it'.

Motion by counsel for defendants to strike out each and every part of the answer on the same ground.

The Court: Same ruling and same exception."

and included the following testimony:

"Q. What was the method by which you undertook to get this data for Mr. Harrod; just describe to the jury what you had to do.

Mr. Edmonds: We object for each of the defendants upon the ground heretofore stated.

The Court: On the grounds heretofore stated your objection is overruled and exceptions noted.

Mr. Edmonds: Exception. Need I repeat them, or to save time may it go in the record what they are?

Order Allowing Appeal.

The Court: So far as it relates to this same class of testimony.

The Witness: My son went horse back, as I said awhile ago, through mud roads where he could not go by automobile."

17. The verdict of the jury and the finding and judgment of the Court and each of them was excessive.

18. And for other errors apparent upon the face of the record.

Wherefore, the defendant prays that said judgment of the District Court of the United States for the Southern District of Ohio, Eastern Division, in favor of plaintiff and against the defendant, be reversed and that said Circuit Court of Appeals render judgment in favor of this appellant which said district court should have rendered or that said District Court be directed to grant a new trial of said cause.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the above Assignment of Errors.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

ORDER ALLOWING APPEAL—Filed September 22, 1928.

This day came the defendant New York Underwriters Insurance Company, by its attorneys, and filed herein, and presented to the court, its assignments of error, and petition for allowance of an appeal intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein

was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court in open court does allow the appeal, upon the defendant giving bond according to law in the sum of $4200.00 to the approval of this court, which shall operate as a supersedeas bond.

Hough, J.

BOND ON APPEAL—Filed September 22, 1928.

Know All Men By These Presents, that we, New York Underwriters Insurance Company, as principal, and the Great American Indemnity Insurance Company of New York, as surety, are held and firmly bound unto J. M. Scott in the full and just sum of Four Thousand Two Hundred Dollars ($4,200) to be paid to the said J. M. Scott, his attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents. Sealed with our seals and dated this 22d day of September, 1928.

Whereas lately, at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit pending in said Court between J. M. Scott as plaintiff and New York Underwriters Insurance Company, as defendant, a judgment was rendered against the said New York Underwriters Insurance Company, and the said New York Underwriters Insurance Company having obtained an order allowing appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the plaintiff citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 22nd day of October, next.

Citation.

Now the condition of the above obligation is such that if the said New York Underwriters Insurance Company, shall prosecute its said appeal proceeding to effect, and answer for all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force, virtue and effect.

New York Underwriters Insurance Company,
By Frank J. Macklin,
Attorney for Principal, New York Underwriters Insurance Co.

Great American Indemnity Company of New York,
By R. M. Edmonds,
[Seal.] Attorney in Fact.

Sealed and Delivered in the presence of:
B. M. Ryan,
Bertha Hathaway.

Approved by:
Hough,
United States District Judge.

Acknowledgment of Service.

We hereby acknowledge service upon us this 22nd day of September, 1928, of copy of the foregoing Bond on Appeal.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorney for Plaintiff.

CITATION—Filed September 22, 1928.

United States Circuit Court of Appeals, for the Sixth Circuit.—Calvin Coolidge, President of the United States of America, ss:—To J. M. Scott, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the 22nd day of October, next,—within 30 days from the date hereof—pursuant to a petition for appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein New York Underwriters Insurance

Company, is appellant and you are appellee to show cause, if any there be, why the judgment rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 22nd day of September, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the United States of America the one hundred and fifty-second.

Hough,
Judge of the District Court.

Service of the above Citation is hereby acknowledged and appearance of appellee is hereby entered.

F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for Plaintiff.

STIPULATION—Filed September 22, 1928.

It is stipulated by and between each and all of the parties to the above entitled cases and their attorneys that a single narrative form bill of exceptions under the captions of all of the above entitled cases may be filed, settled, allowed, signed and used for all purposes as and for the narrative form bill of exceptions in each of the above entitled cases as fully as if separate narrative form bills of exceptions were filed in the several cases.

J. M. Scott, Plaintiff,
By F. S. Monnett,
Attorney for Plaintiff

The Home Insurance Company,
New York Underwriters Insurance Company,
Westchester Fire Insurance Company,
Sun Insurance Office,
Norwich Union Fire Ins. Society,
By Mooney, Bibbee & Edmonds,
Attorneys for each Defendant.

STIPULATION—Filed September 22, 1928.

In the above entitled cause it is stipulated that the printed record may be, by the Clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon appeal in said cause.

James Joyce,
Elwood Murphy,
F. S. Monnett,
Attorneys for Plaintiff.
Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Dated this 21 day of September, 1928.

PRECIPE FOR TRANSCRIPT—Filed September 22, 1928.

To the Clerk:

The clerk of this court is hereby instructed by the defendant in the foregoing entitled cause to make up transcript of the record of said cause in said court for transmission upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and in making up the same to include therein the following pleadings, documents and exhibits, being all of the record in said cause, except summons, subpoenas and returns thereon, and motion directed to said petition and rulings thereon, to wit:

1. Transcript of record of Common Pleas Court of Guernsey County, Ohio, with pleadings and petition, bond and order for removal filed therein and the full transcript on removal.
2. Amended Petition.
3. Second Amended Petition.
4. Answer to Amended Petition.
5. Answer to Second Amended Petition.
6. Reply to Answer to Second Amended Petition.

7 and 8. Orders showing order of consolidation and impaneling and swearing of jury and trial in progress.

9. Verdict for plaintiff.

Precipe for Transcript.

10. Defendant's motion for a new trial.
11. Entry overruling motion for a new trial and entering judgment.
12. Order extending time for filing bill of exceptions.
13. Bill of Exceptions, Narrative form statement of the evidence as approved by the Court.
14. Notice of appeal and acknowledgment of Service.
15. Petition for appeal.
16. Assignment of errors.
17. Order allowing appeal.
18. Bond on Appeal.
19. Citation and acknowledgment of service thereof.
20. All stipulations of counsel filed herein.
21. Precipe for transcript.
22. Clerk's certificate to judgment roll.
23. Clerk's certificate to transcript of record.
24. All other pleadings, proceedings, papers, orders, records, and minutes which are or may become part of the record in this cause with the exception of those papers hereinbefore expressly stipulated as though to be excluded.

The foregoing transcript shall be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

Please deliver all papers to Toothaker & Rodenfels, printers, Columbus, Ohio.

Mooney, Bibbee & Edmonds,
Attorneys for Defendant.

Acknowledgment of Service.

Service of copy of the foregoing directions to the Clerk for making up transcript of record on appeal in said cause is hereby acknowledged this 22nd day of September, 1928.

Elwood Murphy,
James Joyce,
F. S. Monnett,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, Harry F. Rabe, clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Columbus, Ohio, this .....day of.....1928.

.....

Clerk.

By.....,

Deputy.

JOURNAL ENTRY—Filed October 15, 1928.

It being made to appear to the court that under stipulation between counsel in the record, Plaintiff's Exhibit 6, which consists of cinders of burned wool, because of the impossibility of printing the same, need not be printed as a part of the record in the above entitled cause, but that said original Exhibit may be produced and used for all purposes in the Circuit Court of Appeals on request of the Court or either party, it is considered and ordered upon request of Appellant that said original Exhibit 6 be returned and transmitted by the clerk of this court with the transcript of the record in this court to the clerk of the United States Circuit Court of Appeals.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 20, 1928)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

MOONEY, BIBBEE & EDMONDS,
First National Bank Bldg.,
Columbus, Ohio.

CAUSE ARGUED IN PART

(December 4, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are argued in part by Rolland M. Edmonds for Appellants and by F. S. Monnett for Appellee and are continued until tomorrow for further argument.

CAUSE FURTHER ARGUED AND SUBMITTED

(December 5, 1929—Before: MOORMAN, HICKENLOOPER and KILLITS, JJ.)

These causes are further argued by R. M. Edmonds for Appellants and by Elwood Murphy and F. S. Monnett for Appellee and are submitted to the Court.

JUDGMENT

(Filed December 12, 1930)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the District Court remitting the interest from the date of the fire until December 4th, 1926; otherwise, the judgment will be reversed.

OPINION

(Filed December 12, 1930)

Before MOORMAN and HICKENLOOPER, Circuit Judges, and KILLITS, District Judge.

MOORMAN, Circuit Judge: These suits were brought in the state court and were removed by the several defendants to the federal court, where they were consolidated. Each of them sought a recovery upon a policy of fire insurance issued upon wool including woolen bags belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of in-

surance be personal property and be or become incumbered by a chattel mortgage.". In each of the policies there was the further provision that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." This latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was shown by the proofs that on June 19, 1926, the plaintiff executed a mortgage on the property to the Cumberland Savings Bank Co., and that this mortgage was subsisting with the principal unreduced at the time of the fire. It further appeared though that the mortgage had not been verified nor deposited for record as required by the Ohio Statutes. Upon this latter evidence the court concluded that it was not a mortgage but was only a collateral contract and, being of opinion also that no other valid defense was made out, directed verdicts for plaintiff for the full amount of the policies with interest.

The statutes of Ohio provide: Section 8650, a mortgage of chattels "which is not accompanied by an immediate delivery * * * shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section"; Section 8561, such a mortgage "must be deposited with the county recorder of the county where the mortgagor resides"; and Section 8564, "the mortgagee, * * * before the instrument is filed, must state thereon, under oath, the amount of the claim, and that it is just and unpaid." We do not find from the language of these statutes that the failure of the mortgagee to comply with them vitiates the mortgage as between him and the maker. It has been ruled that it does not by the courts of Ohio. *Hutchins* v. *The Cleveland*

Mutual Ins. Co., 11 O. S. 477; *Francisco, et al.* v. *Ryan*, 54 O. S. 307; *Boyer* v. *Knowlton Co.*, 85 O. S. 104; *York* v. *Cassel*, 201 U. S. 344. Hence upon this point we think the court was wrong and that it must be held that the mortgage was an encumbrance within the meaning of the policy provisions relied upon.

Three of the policies, those issued by the Sun Insurance Office, the Norwich Union Fire Insurance Society, and the Home Insurance Company, carried riders providing that any loss occurring under the policies that might be proved to be due the assured should "be payable to the assured and Cumberland Savings Bank Company, subject, nevertheless, to all the terms and conditions of the policy." Two of them, those issued by the New York Underwriters Company and the Westchester Fire Insurance Company, carried no such clause. It is claimed by plaintiff, as to these latter policies, that Stottsberry, the local agent who wrote them, was informed or knew of the mortgage, and hence, under *Foster* v. *Scottish Union & National Insurance Co.*, 101 O. S. 180, and *Hartford Fire Ins. Co.* v. *Glass*, 117 O. S. 145, there were waivers of the policy provisions prohibiting the encumbering of the property. There are two objections to this contention: The first is, the question is not controlled by Ohio law but is one of general jurisprudence, *Hartford Company* v. *Nance*, 12 Fed. (2d) 575 (6 C.C.A.); the other, the contracts of insurance specifically provide that a waiver may be made only in a designated way, and there was no attempt to effect waivers in that way in these cases. We held in both the Nance case and *Hartford Co.* v. *Jones*, 15 Fed. (2d) 1 (6 C.C.A.), that such provisions were binding upon the parties to the contract, and that where the policy contained such a provision, knowledge of the local agent of the forbidden condition did not effect a waiver of the policy provision. There is in our opinion no escape from the application of those cases to the two policies here in question.

Nor did the defendants' failure to tender a return of the premiums that were paid on the policies operate to estop them from urging the effectiveness of the policy provisions. *United States Life Insurance Co.* v. *Smith*, 92 Fed. 502 (6 C.C.A.); *Georgia Home Insurance Co.* v.

Rosenfield, 95 Fed. 358 (6 C.C.A.); *Kentucky, etc., M. Co.* v. *Norwich Union Fire Insurance Society,* 146 Fed. 695. Neither did the action of the adjuster, immediately after the fire, in investigating the loss, amount to a waiver of the breach of those provisions. The evidence shows that plaintiff granted the adjuster permission to make a full investigation, and agreed that such action as he might take in that respect would not constitute a waiver nor invalidate any of the conditions of the policies. It was under this agreement and with the full consent of plaintiff that the adjuster acted. Plaintiff was nowhere misled or prejudiced by his investigation, and certainly it ought not to result in a waiver of a provision with which it had no legal connection. We hold that it did not and also, that the trial court should have directed verdicts for the New York Underwriters and the Westchester Fire Insurance Companies. Whether there are grounds for and the plaintiff may yet seek reformation of the policies issued by those companies are matters not presented on this record. See reference to Northern Assurance Co. case in *Forkner* v. *Twin City Fire Ins. Co.,* 19 Fed. (2d) 419 (6 C.C.A.).

As to the policies with riders providing that any loss occurring under the policies should be payable to the assured and the Cumberland Savings Bank Company, the question is different. In two decisions by this court —*Commercial Union Fire Insurance Co.* v. *Marshall, etc.,* 18 Fed., (2d) 457, and *Firemen's Insurance Co.* v. *Brooks,* 32 Fed. (2d) 451—it has been held that such a rider is tantamount to an indorsement in accordance with the provisions of the policy permitting an encumbrance of the property. It is true that the policies in those cases provided for payment of the loss as "interest may appear"; but under the circumstances we do not think a legal distinction can be founded upon the absence of that phrase from these policies. Nor is *Bates* v. *Equitable Insurance Company,* 10 Wall. 33, inconsistent with that conclusion. In that case there was no evidence "outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured," and hence the question became determinable upon implications arising from the

indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, "the case might be different." In the case at bar the riders appear to have been affixed to the policies by an agent of the company who was also an officer of the mortgagee bank. These riders were in the form and were attached in the manner provided for in the policies, and it is to be presumed, nothing to the contrary appearing, that the agent attaching them acted with full authority. The purpose in attaching them was to grant authority to encumber the property. The language used was that of the insurance companies and was sufficiently comprehensive for the purpose for which it was intended. The reasoning of Judge Hook in the dissenting opinion in the *Atlas Reduction Company* case, 138 Fed. 509, is therefore directly applicable. In the Brooks case, supra, this court chose to follow and apply that reasoning rather than that of the majority opinion. And it was stated in the Brooks case that "if there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is at least not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." In this case it clearly appears that the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage. They are sufficiently comprehensive, as we have said, for that purpose, and being so intended, they seem to us to be quite as effective as they would have been had they contained the further phrase "as interest may appear."

Complaint is made of the court's ruling in consolidating the cases and hearing them together. We think that action was proper. The main question in each case was

that of liability, and each case was decided upon its own facts. There is no showing anywhere in the record that any one of the defendants was prejudiced by the trial of its case with the others. Nor in our opinion was it error to permit plaintiff to proceed with the trial without making the mortgagee bank a party plaintiff. The insurance companies agreed in case of loss to pay the money to the insured and the bank. They could have made the bank a party to the proceedings if they had wanted to. They preferred, apparently, not to do so but to litigate the claim with the party to whom the primary liability was due. After doing this they cannot be permitted to say that the judgment should be reversed because the bank was not a party. Furthermore, there is yet time for them to obtain any protection that they may be entitled to as against the bank, for when the case is remanded, the court below will see to it, no doubt, that the money is paid into court to be held until the rights therein as between the plaintiff and the bank are determined.

The remaining defense relates to arbitration. The policies provided, in the event of disagreement as to the amount of the loss, the same should be ascertained by arbitration, the insurance companies and the insured each to select an arbitrator, and the two so chosen to select an umpire. They further provided that no suit or action on the policies for the recovery of any claim should be maintained in any court of law or equity until there had been full compliance by the insured with all the terms and requirements of the policies. There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained.

It results from the foregoing that the lower court was right in directing verdicts against the Sun Insurance Office, the Norwich Union Fire Insurance Society and the Home Insurance Company. The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed. For the reasons hereinbefore stated the judgments against the New York Underwriters Company and the Westchester Fire Insurance Company are reversed.

KILLITS, District Judge, dissenting:

In *United States Fidelity and Guaranty Co.* v. *Guenther*, 31 Fed. (2d) 919, 920, this Court cited *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 463, to the effect that the contract provisions involved in the case then before it are manifestly "to be construed according to the sense and meaning used, and, if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense." In that connection *Thompson* v. *Phoenix Insurance Co.*, 136 U. S. 287, 297, was also cited to the point that if the policy "is so drawn as to require interpretation and to be fairly susceptible to two different constructions, the one will be adopted that is most favorable to the insured."

These citations were the premise to a comment that "resort cannot be had to this latter rule to nullify the plain and obvious provisions of an insurance policy. * * * But the question remains whether the language used is in fact susceptible to a double meaning, or, otherwise expressed, whether it will fairly and reasonably support that construction upon which liability of the insurer may be sustained."

Sanborn, Judge, in *Insurance Co.* v. *McNulty*, 157 Fed. (C.C.A.) 224, 226, referring to the second rule above quoted said: "But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured."

The dissent, which, regretfully, I feel impelled to offer to the majority opinion respecting the three cases considered involving, respectively, the policies issued by the Norwich Union, Sun and Home Insurance Companies, is founded altogether on what seems to me to be the right application to the facts of each of these cases of the principles above stated. I would make but one supplement, the propriety of which seems to me to be above question, that, when the consideration is of a rider or indorsement upon a policy of insurance, offered as a waiver of a plain provision of the contract, which waiver, as provided in another contract provision, can be effective only when it meets the plain terms of such a permitting provision, such attempts to waive must also come for interpretation as to effect under the same rules of construction as the contract itself.

In *Atlas Reduction Co.* v. *New Zealand Insurance Co.*, 138 Fed. (C.C.A.) 497, the precise question was present which, in the instant cases, is fundamental to the division in this Court, i. e., the effect of a rider upon the policy, offered as a waiver of a defeasance provision exactly in the terms of provisions of that character in the contracts before this Court. The parallel is completed in the fact that also the terms of a clause in the contract there specifying how, only, a waiver could be effected, are *ipsissimis verbis* of similar provisions in the present contracts.

In the majority opinion in the Atlas case, by Vandevanter, Judge, the following from *Fire Insurance Company* v. *Coos County*, *supra*, equally pertinent to the instant cases, is quoted:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other;

and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue to terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

This majority opinion proceeds to state the controlling question in that case as follows:

"What, in view of the plain and unambiguous stipulations in the policy, is the meaning and interpretation of this loss payable indorsement. Obviously, the words used therein must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision or condition thereof waived, only by a writing of equal dignity and credit with the policy itself."

Then followed a pertinent quotation from *Northern Assurance Co.* v. *Grandview Building Co.*, 183 U. S. 308, 364, a decision the importance of which to a consideration of the instant situation should not be overlooked.

The point now involved can be no more clearly stated than in the language of the foregoing from the Atlas majority opinion. It is true that this Court, in decisions referred to later herein, has favored Judge Hook's dissent in that case, but, as we read the divergent opinions, the division there was a difference of judgment whether the waiver rider peculiar to that case, was reasonably in conformity to the terms of the contract by compliance with which, only, a waiver could be effective.

It is convenient here to re-state the pertinent language of the several policies involved in this discussion providing for avoidance of the contracts and for the manner in

which, only, right to avoid by the insurer may be waived. The policies differ but in the placing of the paragraph which is numbered one, below: In the Home and Norwich Union policies it is on the face of the contracts, preceding the stipulations we number herein two and three, whereas in the Sun instrument, it follows two and three, but, in each instance, it is addressed to the same stipulations. The quotation is from the Home policy, and the italics are mine.

1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the *subject of agreement* endorsed hereon or added hereto, and as to such provisions and conditions *no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver,* if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured *unless so written or attached.*

2. This entire policy, unless otherwise provided *by agreement* indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; * * *.

3. If, with the *consent* of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

My view is, that to be effective, the indorsement or rider, claimed to work a waiver, as provided in the stipulation numbered one, above, must be so worded that the

acceptance of it by the insurer should be regarded as an *agreement* to continue the contract in spite of the otherwise avoiding presence of a mortgage lien; i. e., that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgagee.

In *Assurance Company v. Grandview Building Association, supra,* it was held—183 U. S., 361, that the

"limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture,* dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts,* ratified the action of the agent." (Italics mine.)

The sweeping effect of this decision and its continued unabated authority, applicable to the instant situations, is not open to question—recognized frequently and recently by this Court in unison with all other federal tribunals.

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

In the Atlas case the rider waiver, whose sufficiency was questioned, was: "Subject to all of the conditions of this policy, loss, if any, payable to D. & S. *as their interest may appear.*" The majority holding was that this language did not "in terms or by implication consent to the incumbrance created by the chattel mortgage." Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase "as interest may appear"

was used in such cases to refer to a chattel mortgage interest. This Court, in *Commercial Union Insurance Company* v. *Marshall,* 18 Fed. (2d) 457, 458, 459, where the rider was: "any loss * * * proven to be due to the insured on this policy shall be held payable to D. "*as interest may appear*", indicated its preference for Judge Hook's reasoning and conclusion, but found that it "expressly appeared," in the record before it, "that according to the usages and practices of the community and of these insurance companies, this phrase 'as interest may appear' was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest." It was also held, independently of Judge Hook's view in the Atlas case, that "the stipulation that the loss should be payable to Dacus 'as interest may appear' * * * applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter."

In *Firemen's Insurance Company* v. *Brooks,* also by this Court, 32 Fed. (2d) 451, the rider was, page 451, "Any loss * * * shall be payable to Thomas Trimby, *as interest may appear,* subject, nevertheless, etc." In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be aplpicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit."

In the Sun and Norwich Union cases the waiver rider was attached nearly a week after the chattel mortgage had been given, and nearly two weeks after the policies had issued. In the Home case that was done contemporaneously with the issuance of the policy. Upon this

phase, this Court in the Brooks case observed, page 452, 18 Fed., 2nd,

"One distinction may be suggested, inherent in the facts of the Atlas Case. The loss payable clause was there added after the policy had been some time in force. There was a distinctly greater possibility that the insured might be using the policy as security in some way disconnected from the property, so that "interest" might mean interest in the proceeds only rather than interest in the property, than there could be in a case where the clause is simultaneous with the policy,—for the loss payable clause is the customary means of protecting a then existing interest in the property."

The foregoing concerning Judge Hook's position in the Atlas case, and the view of this Court in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase "as interest may appear" in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof. These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that when that is done the insurer is called upon only to consider whether in case of loss it will honor such an appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq., 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See, also, the Bates case, *infra*. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity

exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties, while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent "where plain and unequivocal language is employed."

I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the "as interest may appear" decisions, for that important phrase is entirely absent. Its wording is: "Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

Secondly, there is not the slightest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is "in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest", i. e., chattel mortgage interest.

In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted

stipulations which the majority considers it to qualify—these three factors and, absolutely, nothing else.

The majority apparently does not agree with this and I therefore hesitatingly proceed to take issue with certain fact statements in the majority opinion. Therein it is said of the riders: "The purpose of attaching them was to grant authority to encumber the property by chattel mortgage." Aside from the fact that there was a mortgage, I can not find anything on the record to support that statement. All that catches my attention is that, without comment, the riders were offered and received as attachments to the several policies and that Bracken, the issuing agent, said this and nothing more: "At that time I attached the loss payable clause to those policies as agent for the companies." Even this language is ambiguous as to time and supports an incorrect inference, for the Sun and Norwich Union policies were issued June 14, the mortgage executed June 19, and the riders attached June 24, while the Home policy issued July 6 bearing the rider attached as of that date. Hereafter will be discussed the equivocal position of Bracken which deserves consideration when is sought to be decided the capacity in which he attached the riders.

Nor am I able to find in the record any testimony or proof supporting this in the majority opinion: "The language (of the riders) used was that of the insurance companies." This Court, in Marshall's case (18 Fed., 2nd, 457, 459), apparently entertained no criticism of Judge Hook's notice of customs (138 Fed., 514). If we may follow that precedent and consider, as Judge Hook said, "as a matter of common knowledge" what, "among those having to do with fire insurance either as agent of insurers or as insured," was the form of a loss payable clause, adopted by companies doing fire insurance business in Ohio, as the uniform standard for Ohio, used for years before, and in 1926, and ever since to this time, it would be found to include this pregnant phrase, which Bracken did not employ even by implication: "As their (the payees') respective interests may appear."

The majority opinion invites attention to the "circumstances" of the instant cases, under which it is of the opinion that no "legal distinction (between Judge Hook's

opinion and those in the Marshall and Brooks cases) can be founded upon the absence of that additional phrase (as interest may appear) from these policies." There are, indeed, unusual circumstances shown exclusively upon the records before us, but these, so far from diminishing the importance of the absence of the critical phrase, in my judgment emphasizes the necessity of using it if the rider was to operate as a waiver of the lien inhibition.

First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued. Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market. His proof of loss admits that this property cost him in 1925 $34,800 and that its value at the time of the fire was but $28,700, a shrinkage in value of seventeen and one-half per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926, or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200, "represented (language of chattel mortgage) by various promissory notes of various dates and amounts," signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8,000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,500, was at the same time cashier of the chattel mortgagee bank. August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy. August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again

bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 1,000 population as shown by the census. Bracken had been at the storage place during the period involved "several times to see Mr. Scott (the insured) on business." The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening creditors of Scott.

I draw no inferences from these facts save, 1. That Scott was in losing and involved circumstances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used.

Crass stupidity may explain why Bracken failed to protect his bank against Scott's creditors and used a defective rider, but a more reasonable explanation, considering that he had been chosen to hold two responsible positions, is that he had some purpose to serve thereby, for these omissions are correlated. However, the circumstances noted do not appear to me to have the effect, suggested by the majority, to render of no consequence the absence of the customary "interest" phrase.

One matter does however so stand athwart the situation as to greatly weaken the plaintiff's case by destroying one inference which otherwise might be helpful and

that is Bracken's duality of representative obligations when he acted in attaching the riders. These were then incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and, correspondingly to the disadvantage of his insurance principals. This incompatible duality makes it impossible to attribute to the insurers any act of his which favored either the bank or the insured through the bank. *Mulrooney* v. *Royal Insurance Company,* 163 Fed., 833, 835, 9 C.C.A.; *Arispe Mercantile Company,* v. *Capitol Insurance Company,* 133 Iowa, 272, s. c., 9 L. R. A., N. S., 1034, and annotations; *American Surety Company* v. *Pauly,* 170 U. S. 133; *Aetna Indemnity Company* v. *Schroeder,* 12 N. D. 116. Consequently it may not be charged against the insurers that they, through their agent, produced and attached the riders. We have, therefore, as I look at it, nothing in this record to serve our judgment of the effect of the riders, save the inhibiting stipulations of the contracts, the provisions for waiving those stipulations and the wording of the alleged waiver.

It is difficult for me to see how any support for the majority position is found in the three "as interest may appear" cases. I do not entertain any question whatever but that our Marshall and Brooks cases were rightfully decided. But to go beyond them, and to ignore, while still using them, the critical fact upon which each depended, is, I think, without justification. When they are eliminated from the majority opinion it seems to be entirely without precedent, unless it be the Bates case soon to be discussed.

As I construe the language of this rider it tends to rebut an impression that the Bank held an interest in the insured property, of whatever sort, because if its right to participation in a recovery in consequence of such interest existed at all, the measure of that recovery would be the extent of the interest—here the direction is that damages *"due the assured"* are to be "payable to the assured" *and,* the Bank, divided on apparently equal terms between them. There is nothing which, once the direction is accepted by the insurer, requires the latter to go behind its terms to see that the extent of the Bank's

interest in recovery is exactly protected—it casts upon the insurer no duty of inquiry whatever.

The insurance practice, noted by Justice Miller in the Bates case, *infra,* and Judge Denison in the Marshal case, of appointing, as co-payee of a loss, one who has no interest in the subject of insurance, is a factor of interpretation in such cases as we have here—one upon which the issuing companies were entitled to rely, and which this Court should also consider. It is also noteworthy that the provision for a waiver of the defeasance clause says that the attached or indorsed waiver shall take the form of an "agreement" to waive. The question, therefore, is whether this rider achieves the dignity of an "agreement" to waive a very serious moral hazard, not referred to therein, and which the terms of the contract inhibit without a specific agreement.

I am unable to see the slightest ambiguity whatever in the language of the rider in these cases—it is just what it might well be to make the Bank a mere appointee in proceeds of recovery alone, with no suggestion that that appointment is based upon a subsisting interest in the corpus. Riders and indorsements of no less equivocal or ambiguous character than this have been before the courts to be interpreted to that result. One citation, still authoritative, which the majority cites, is sufficient for the present discussion. In *Bates* v. *Equitable Insurance Company,* 10 Wallace, 77 U. S. 33, where a policy contained the usual covenant that if the property were sold the insurance ceased unless the insurer consented in writing, it was held that an indorsement that the policy was "payable, in case of loss, to E. C. Bates" followed by the insurer's indorsement that "consent is hereby given to the above indorsement" did not imply either a knowledge or consent to a sale of the insured property. In this case the property had been sold to Bates, the appointee. In it, as here, there was, as noted by Mr. Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or of usage and custom which qualified the language used, wherefore the Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the Company, that any loss sustained by Philbrick, covered

by that policy, should be paid to Bates." As to this case the majority opinion says: "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.' "

In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which "the case might be different," wherefore, here, as in the Bates case, "the question becomes determinable upon implication arising from the indorsements (rider) alone."

My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that "resort cannot be had," in a case such as here, to the rule respecting resolution of ambiguities, because there is here no "double meaning" for that here the language used will not "fairly and reasonably support that construction upon which liability of the insurer may be sustained," and that our judgment should be, as in the Westchester and New York Underwriters cases, that the trial court should have directed verdicts for the defendants whose cases are herein considered.

The majority opinion savors, in my judgment, of a controversion of Judge Sanborn's injunction, *Insurance Company v. McNulty, supra,* that the rules as to ambigu-

ities cannot be permitted "to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the assured." Judge Hook, concluding his dissent in the Atlas case (page 516, 138 Fed.) says of the decision of the Supreme Court in the Northern Assurance case, *supra*, that by it "the tendency to the unrestrained invasion of the clear terms of policies of insurance by oral testimony which was so destructive of the rights of the companies has been well checked." It seems to me that the majority position tends to lower the bars to such invasion which the Supreme Court erected. The majority conclusions appears to me, also, inconsistent with the decisions of this court in the Nance and Jones cases, 12 Fed. 2nd 575, Syllabus 5, and 15 Fed. 2nd 1, Syllabus 3.

Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the immanent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the matter of what knowledge the insurers had of the purpose of the riders that counts. They convey no hint of a chattel mortgage and there is not a scintilla of proof that the insurers knew anything about it whatever. As the language of the riders is without ambiguity, sufficient and reasonable to perform a far different office well known in insurance practice, it does not suffice to put the insurers on inquiry, even if the longest period, June 24 to September 5, may be considered a reasonable time for such inquiry by these particular companies.

There is no proof or even pleading that any one of the three companies knew of the mortgage, or had the slightest hint that the Bank was interested in the insured property in any way; nor is there proof or pleading that it was intended by this phraseology to convey such information to any insurer, or to have the rider work the

waiver of the defeasance clause of the contract. The insured, Scott, knew, by the character of the answer, that defense would be made that the rider was inadequate to serve the purpose for which the majority of this Court now holds it is sufficient. He had his opportunity, which is not yet lost, to reform the contract if he has proof with the essential qualifications which would make reformation possible at equity, wherefore there is no place here, *ex debito justiciae,* to relieve him, even if that were justifiable in these straight actions at law. Respectfully it is urged that courts, even Appellate Courts, should be slow, especially in cases at law, to relieve parties from the consequence of ineptitude or carelessness in presentation.

In my judgment the fact is not significant that in the Home case the issuing of the policy and the attachment of the rider were simultaneous, whereas in the other cases the rider was attached to an old policy.

As intimated I concur in the disposition by the majority of the Westchester and New York Underwriters cases. The Home, Sun and Norwich Union cases clearly seem to me to deserve the same findings and order.

CERTIFIED COPY OF REMITTITUR

(Filed December 20, 1930)

APPLICATION

Now comes the plaintiff, J. M. Scott, and asks leave of Court to file a remittitur of the excessive amount of judgment heretofore rendered in this Court, in the following cases, to-wit:

J. M. Scott v. *The Home Insurance Company of New York,* No. 2560.

J. M. Scott v. *Sun Insurance Company,* No. 2563.

J. M. Scott v. *Norwich Union Fire Insurance Society, Ltd.,* No. 2564.

On the ground that the United States Circuit Court of Appeals of the Sixth District, on the 12th day of December, 1930, affirmed the judgment of this Court in said respective cases; as to the excessive amount used the following language:

"The judgments against those companies, however, carried interest from the date of the fire. In this respect they were erroneous, for each policy provided that the sum for which the insurer should become liable should not accrue until sixty days after proof of loss. Proofs of loss were made on October 4, 1926. The judgments against these three companies will therefore be affirmed upon condition that appellee file in this court within thirty days a certified copy of a remittitur filed in the district court remitting the interest from the date of the fire until December 4, 1926, otherwise the judgments will be reversed."

The remittiturs are hereto attached to this Application, under mark of Exhibit A, B, and C respectively, containing the amount of the excessive interest, as ordered remitted in said appellate decision.

(Signed) J. M. Scott, *Plaintiff,*
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

REMITTITUR

Be It Remembered that on the trial of this case before the United States District Court for the Southern District of Ohio, Eastern Division, on the 12th day of December, 1930, it appeared that there had been an excessive amount of interest computed in the verdict and judgment in case No. 2560 from the 6th day of September, 1926, to the 4th day of December, 1926, a period of ninety days amounting to the sum of $120.00.

And therefore, the said J. M. Scott, plaintiff herein, by F. S. Monnett, one of his attorneys, freely remits to the said The Home Insurance Company of New York, defendant herein, the sum of $120.00 interest on the said sum of $8000.00, being interest computed for said ninety days.

(Signed) J. M. Scott, *Plaintiff,*
By F. S. Monnett,
James Joyce,
Elwood Murphy,
Attorneys for the Plaintiff.

Application of J. M. Scott, plaintiff in the cases set forth in said application, has been made to this Court for leave to file his remittiturs in said cases on the grounds therein named. Granted.

It is ordered that the Clerk of this Court prepare certified copies of said remittiturs and forward same to the Clerk of the Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio.

(Signed) Hough, *Judge.*

A True Copy of the Original
Filed December 19, 1930.

Attest: Harry F. Rabe, Clerk
by James H. Clark, Deupty.

(Seal)

JUDGMENT ON REMITTITUR

(Filed January 6, 1931)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

The Court having filed its opinion and appellee, J. M. Scott, having thereupon filed in this court a certified copy of the remittitur entered in the court below, whereby it appears that said J. M. Scott consents to remit from the judgment theretofore rendered, the interest from the date of the fire until December 4, 1926.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, as so reduced, be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed February 10, 1931)

The petition for rehearing of this cause is hereby denied, Judge Killits dissenting.

MOTION TO STAY MANDATE

(Filed February 13, 1931)

To the Honorable United States Circuit Court of Appeals, Sixth Circuit, and the Judges Thereof:

Now comes The Home Insurance Company, the appellant in the above entitled cause, and shows to this Court that the appellant desires to and will, file with the United States Supreme Court a petition for a writ of certiorari from the United States Supreme Court in this cause, and that it is necessary in order to facilitate and make possible the filing of and to enable this appellant to file such petition for a writ of certiorari and to secure the granting of such writ of certiorari by the Supreme Court of the United States, that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and withheld until March 16, 1931.

Wherefore, appellant prays that the mandate of this Court and the execution and enforcement of the judgment heretofore rendered in this cause be stayed and with-held until March 16, 1931.

Mooney, Bibbee and Edmonds,
Attorneys for The Home Insurance Company, Appellant and Applicant.

Dated February 13, 1931.

ORDER STAYING MANDATE

(Filed February 13, 1931)

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date,—provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof or, if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *The Home Insurance Company* v. *J. M. Scott,* No. 5275, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of February, A. D. 1931.

J. W. Menzies
[SEAL] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(913)

FILE COPY

MAR 9 1931

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 30

THE HOME INSURANCE COMPANY, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROLLAND M. EDMONDS,
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Counsel for Petitioner.

JAMES JOYCE,
Cambridge, Ohio;
ELWOOD MURPHY,
Grand Theatre Bldg., Columbus, Ohio;
F. S. MONNETT,
35 E. Gay St., Columbus, Ohio,
Counsel for Respondent and Appellee Below.

(35,703)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 781

THE HOME INSURANCE COMPANY, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is one of five cases at law commenced by the respondent, the plaintiff below, against your petitioner,

the defendant below, and four other insurance companies, which were brought in the State Court of Ohio and removed to the United States District Court for Southern Ohio upon the ground of diversity of citizenship, where the five cases were consolidated by order of the District Court. Two of these five cases, in which the New York Underwriters Insurance Company and the Westchester Fire Insurance Company were defendants below, terminated in judgments by the United States Circuit Court of Appeals, Sixth Circuit, reversing the judgments of the District Court, which had been in favor of the plaintiff below, and are therefore not here for consideration. There was but one opinion rendered by the Circuit Court of Appeals in passing upon the merits of all five of the cases.

Identical petitions for writs of certiorari and identical briefs in support thereof are now filed in this Court by the defendants below, Sun Insurance Office, Norwich Union Fire Insurance Society, Ltd., and The Home Insurance Company, against each of which judgments were rendered by the District Court (R. 45), and affirmed by the United States Circuit Court of Appeals, Sixth Circuit (R. 248), by a divided court.

Each of these suits sought a recovery upon a policy of fire insurance issued upon wool, including woolen bags, belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows (R. 34, 35): "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest

of the insured be other than unconditional and sole ownership, * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision (Sun Insurance Office, R. 132, 133, Exhibit 4; Norwich Union Fire Ins. Soc., R. 135, Exhibit 5; Home Ins. Co., R. 104, 105, Exhibit 1) that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was admitted in the pleading (R. 21, 28) and established without dispute (R. 58) that on June 19, 1926, the plaintiff executed a chattel mortgage on the property to the Cumberland Savings Bank Company, and that this chattel mortgage was subsisting with the principal unreduced at the time of the fire.

Endorsed upon the policy in suit was the following loss-payable clause (Sun Ins. Office R. 127) (Norwich Union Fire Ins. Soc. R. 135) (Home Ins. Co. R. 104):

"Loss Payable Clause.

"Any loss under this policy that may be proved due shall be payable to the assured and

The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The question involved in view of the foregoing is whether, as held by the majority opinion of the Court of Appeals, this loss-payable clause, which neither mentioned a chattel mortgage nor described the payee therein as chattel mortgagee nor recognized any property right in such payee in the property insured, constituted a written waiver of the prohibited chattel mortgage.

The policy in suit further provided (Sun Insurance Office R. 131) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 109) that, in the event of disagreement as to the amount of loss, the same should be ascertained by appraisers, the insurance company and the insured each selecting an appraiser and the two so chosen to select an umpire, and that the award in writing of any two should determine the amount of such loss.

The policy further provided (Sun Ins. Office R. 132) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 110) that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until after full compliance by the insured with all the above requirements, and that the loss should not become payable until sixty days after such ascertainment, including an award by appraisers (R. pages 109-110).

After the fire and before any communications whatever were had by the insurance company, or any rep-

resentative thereof, with the plaintiff below, a written non-waiver agreement was signed and entered into by and between the parties (R. 141, 142), which provided, in part, as follows:

> "It is hereby mutually stipulated and agreed that any action taken by the insurance company or companies, signing this agreement, in ascertaining the amount of loss and damage which occurred September 6, 1926 to property located in rear lot W/S of Cambridge St. Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.
>
> "Notice is hereby given and accepted, and it it hereby mutually understood and agreed, that no representative of any insurance company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing."

After sworn proofs of loss, in which the plaintiff set forth his claim as to the amount of loss, were furnished by the plaintiff below to the defendant insurance company (Sun Insurance Office R. 175, Exhibit 17) (Norwich Union Fire Insurance Society R. 187, Exhibit 18) (Home Insurance Company R. 142, Exhibit 14), and the defendant insurance company advised the plaintiff below in writing that the defendant insurance company disagreed with the plaintiff below as to the amount of the loss caused by the fire in question, as stated in his proof of loss (Exhibit 19, Home

Insurance Company R. 198, (Exhibit 22, Sun Insurance Office R. 202) (Exhibit 23, Norwich Union Fire Insurance Society, Ltd., R. 203), then, without further communication, oral or written, between the parties, the plaintiff below commenced the present suit without obtaining an award of appraisers fixing the amount of the loss, or making any demand or request therefor. The disagreement between the parties as to the amount of loss and plaintiff's failure to obtain an award of appraisers as to the amount of the loss were alleged by the defendant below in its answer (R. p. 34).

In the face of these undisputed facts, and in spite of the rule settled by the Supreme Court of Ohio and binding upon the Federal Courts, that such disagreement as to the amount of loss made the procurement by the insured of an award of appraisers fixing the amount of the loss a condition precedent to any right of action, the District Court held (R. pp. 94, 95) that no obligation rested upon the insured, plaintiff below, to obtain an award of appraisers as a condition precedent to a right of action on the policy. The United States Circuit Court of Appeals, on the other hand, in its majority opinion, while recognizing that an award of appraisers was a condition precedent to a right of action, held that the performance of such condition precedent by the plaintiff below had been waived, because, as the Circuit Court of Appeals said in its opinion, "the defendant denied liability before suit was brought and after it was brought" (R. 229).

There is no evidence whatever in the record of any denial of liability by the insurance company prior to

the commencement of suit, and the only action taken by the defendant insurance company after commencement of suit was its action in filing its answer, in which it pleaded two defenses, as permitted by the statutes of Ohio: (1) The defense of failure by the plaintiff below to perform the condition precedent of the contract as to appraisal, and (2) the further consistent defense of incumbrance of the property by chattel mortgage, in violation of the terms of the policy.

Another question involved, in view of the foregoing, is whether, as held by the majority of the Court of Appeals, an insurance company whose only dealings with the insured after a loss are under a non-waiver agreement, and whose only communication with the insured consisted of a written disagreement with the insured as to the amount of the loss without in any way denying liability, and whose only action after suit is brought is the filing of an answer setting up two consistent defenses (as here, failure to obtain an award of appraisers and violation of the condition prohibiting incumbrance by chattel mortgage) can be deemed to have waived, or held to be estopped to set up, the insured's non-performance of the appraisal condition.

The trial in the United States District Court was by jury and a verdict and judgment by direction of the District Court were rendered in favor of the respondent, J. M. Scott, and against the petitioner herein, The Home Insurance Company, for $8,922.66, which included interest from the date of the fire (R. 45). An appeal from said judgment was taken by the petitioner herein, The Home Insurance Company, to the United

States Circuit Court of Appeals, Sixth Circuit (R. 206 to 222), which affirmed the judgment of the United States District Court (R. 248) by a divided court (see dissenting opinion of Judge Killetts, R. 230-245) after a certified copy of a remittitur of the interest from the date of the fire, September 6, 1926, until December 4, 1926, had been filed (R. 246, 247) in accordance with the order of the United States Circuit Court of Appeals (R. 224). A petition for rehearing was filed in the United States Circuit Court of Appeals by your petitioner herein on January 9, 1931 (R. 249), and was denied, Judge Killetts dissenting, on February 10, 1931 (R. 261).

II.

Reasons Relied Upon for Allowance of the Writ.

A.

The majority decision of said Circuit Court of Appeals in holding that the appointment of a creditor to receive the proceeds of a fire-insurance policy by written endorsement on the policy of a loss-payable clause, which by its terms is expressly made subject to all the conditions of the policy, is a written waiver of a condition of the policy prohibiting chattel mortgage, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497 (opinion by Judge Van Devanter).

B.

The majority decision of said Circuit Court of Appeals as to the effect of the loss-payable clause attached to the policy in suit, by holding that such loss-payable clause—though by its express terms it was "subject to all the terms and conditions of the policy", and though such loss clause contained no reference to chattel mortgage and no description of the payee as chattel mortgagee or as having any interest whatever in the property—is nevertheless a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage, there being no pleading or proof of a course of dealing between the parties or of usage and custom qualifying the unambiguous language used, has decided an important question of general law in a way probably untenable or in conflict with the weight of authority, including the decision by this Court in

Bates vs. Equitable Insurance Co., 10 Wall. 33.
Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

C.

The majority decision of said Circuit Court of Appeals in considering and basing its decision upon a custom, when not pleaded or in evidence, and ingrafting a meaning into a contract by construction based upon such assumed, unpleaded and unproven custom, where the written contract is clear and unambiguous and not open to construction (Majority Opinion, R. 227-228), has decided an important question of general law in a way probably untenable or in conflict with the weight

of authority and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Bates vs. Equitable Insurance Company, 10 Wall. 33.

D.

The majority decision of said Circuit Court of Appeals while professing to hold, in accordance with the law as settled by this Court, that knowledge of the insurer's agent, not communicated to his principal, of the prohibited incumbrance by chattel mortgage may not be imputed to the insurer to effect a waiver or estoppel under the form of insurance contract here involved, has, nevertheless, in its opinion, in fact given effect to evidence of such claimed knowledge by the agent in deciding that "the purpose in attaching the loss-payable clause was to grant authority to incumber the property", and in holding that "the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage" (R. 228). Such decision by the majority of the Circuit Court of Appeals is an erroneous decision of an important question of general law, and a decision in conflict with the law as settled by this Court on the question.

Northern Assurance Company vs. Grand View Building Association, 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Company, 216 United States Reports, 311 (1910), Syl, and pp. 321-322.

Mutual Life Insurance Co. vs. Hilton Green, 241 United States Reports, 613, 624 (1916).

Ætna Life Insurance Company vs. Moore, 231 United States Reports, 543, 559 (1913).

Prudential Insurance Company vs. Moore, 231 United States Reports, 560—Syl. 3 (1913).

E.

The majority decision of said Circuit Court of Appeals in holding that an insurance company, which simply disagrees with the insured's claim as to the amount of the loss without denying liability prior to suit, and which, subsequent to suit, merely files an answer alleging the defense of failure by the insured to perform the condition precedent as to appraisal of the amount of loss and alleging further a defense of incumbrance by chattel mortgage in violation of the terms of the policy, has thereby waived performance by the insured of the appraisal condition precedent of the policy, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

Insurance Company vs. Carnahan, 63 Ohio State, 258, Syllabi 5 and 7.

Graham vs. Insurance Co., 75 Ohio State, 374.

Edward Everett Co. v. Great American Insurance Company, 9 Ohio *nisi prius* Reports (new series), 241 (affirmed 81 Ohio State, 573).

Fire Association vs. Agresta, 115 Ohio State, 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd), 754.

F.

The great importance to the business world and the insuring public, as well as the legal profession, and the need of an authoritative and elucidating decision by this Court as to the legal and operative effect of a loss-payable clause of the form here involved, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict of opinion between the various Circuit Courts of Appeal and the judges of the United States Circuit Court of Appeals in this case.

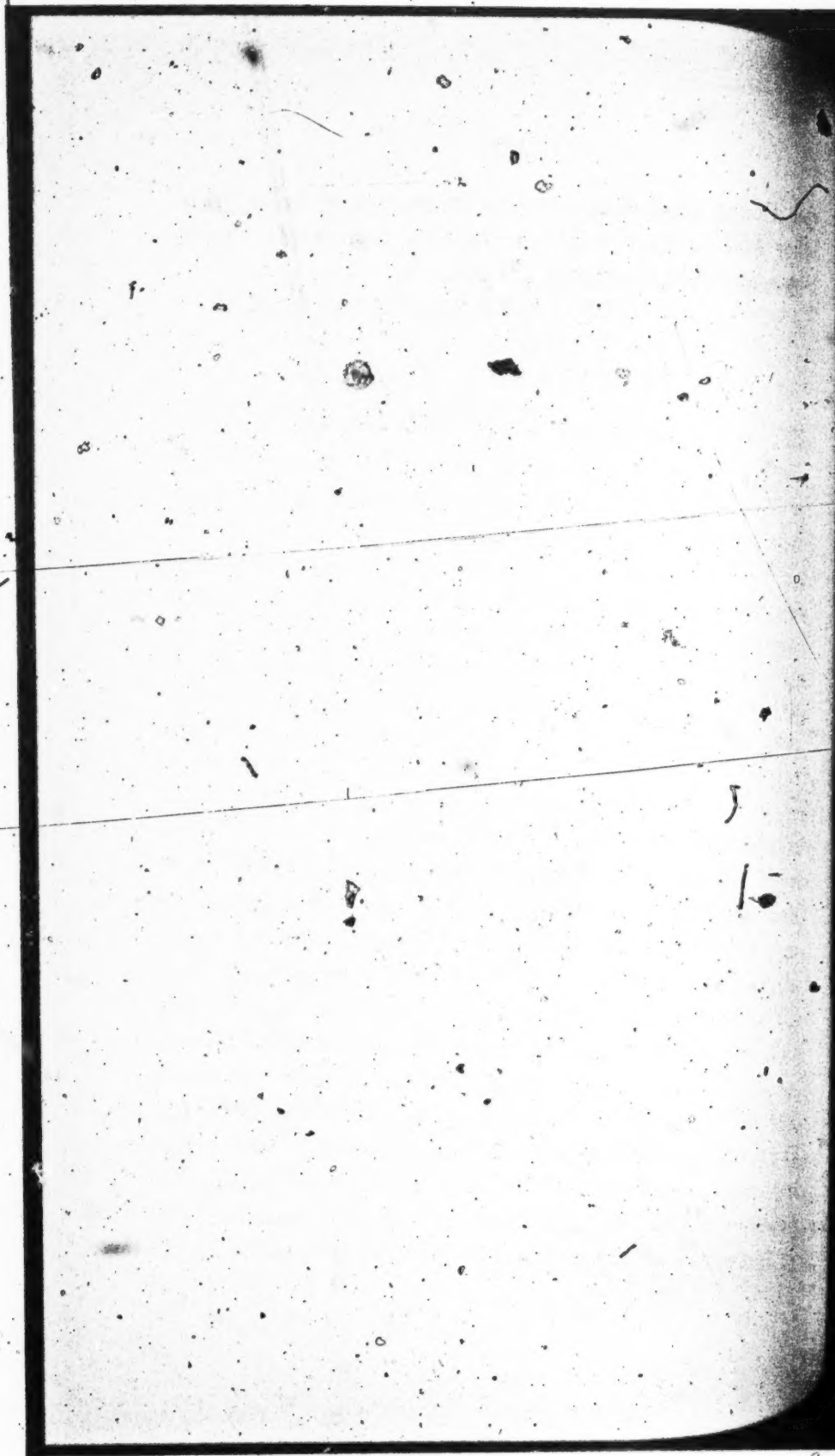
WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 5275, The Home Insurance Company, appellant, *vs.* J. M. Scott, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by

this Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet, just and proper.

THE HOME INSURANCE COMPANY,

By ROLLAND M. EDMONDS,

Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 781

THE HOME INSURANCE COMPANY, PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinions in the United States Circuit Court of Appeals, Sixth Circuit, which have not yet been reported, appear: Majority Opinion (R. 224-230); Dissenting Opinion (R. 230-245).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 6, 1931 (R. 248).

The petition for rehearing filed by this petitioner January 9, 1931 (R. 249), was denied February 10, 1931 (R. 261), Judge Killetts dissenting.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is *Judicial Code, Section* 240, as amended by the act of February 13, 1925, Chapter 229 (43 Statutes at Large, pp. 938, 939) (28 U. S. C. A. No. 347).

3. This is a civil action in the United States Circuit Court of Appeals for the Sixth Circuit in which a judgment has been rendered against this petitioner (R. 248) and in which a petition for rehearing has been filed (R. 249) and denied (R. 261).

The jurisdiction of this Court is invoked upon the several grounds specifically assigned in the petition submitted herewith and hereafter summarized in this brief under the heading "Specification of Errors."

4. The cases believed to sustain such jurisdiction are as follows:

Forsyth vs. Hammond, 116 United States Reports 506, 514, 515.

Delk vs. St. Louis & San Francisco R. R. Co., 220 United States Reports, 580-586.

Lau Ow Bew vs. United States, 144 United States Reports, 47, 58.

III.

Statement of the Case.

This case has already been stated in the preceding petition for writ of certiorari under subdivision I, headed "Summary Statement of the Matter Involved" pp. 1-8.

Supplementary thereto and with particular reference to the increase of hazard involved in the prohibited incumbrance by chattel mortgage in the instant case, we quote the following additional facts in the language of the dissenting Circuit Court of Appeals opinion of Judge Killetts (R. 239-240), with appropriate record pages added thereto:

> "First in order of time was the insured's situation, June 14, 1926, when the Sun and Norwich Union policies issued (Exhibits 4 and 5, R. 125, 133). Then, according to insured's (Scott's) testimony, he had stored, afterwards destroyed, at least 70,000 pounds of wool, mostly bought in 1925, and held for a year on a falling market (R. 78). His proof of loss admits that this property cost him in 1925 $34,800.00, a shrinkage in value of 17½ per cent. The amount of wool as 70,000 pounds depends upon his naked word. An attempt at corroboration by going to his vendors disclosed 40,006 pounds purchased in 1925, and 7,187 pounds in 1926 (R. 78), or 47,247 pounds in all. On this he had, until June 14, $5,000 insurance in the Westchester company. He was indebted, according to his testimony, to the Cumberland Savings Bank in the principal sum of $18,200 (R. 76),

'represented (language of chattel mortgage) (Exhibit 24, p. 204) by various promissory notes of various dates and amounts', signed by himself, by his wife, or by both. Having taken out the Sun and Norwich Union policies for an aggregate of $11,500 on June 14, five days later he gave the Bank the chattel mortgage, and five days still later or ten days after their issue, the Sun and Norwich Union policies were caused to carry the rider loss payable clause. Then, July 6, he took out the Home policy for $8000 on which, at once, was attached the rider. Bracken, the agent writing these three policies for $19,000, was at the same time cashier of the chattel mortgagee bank (R. 81). August 14 the last policy for $3,500 was taken out. During the season of 1926, Scott's principal purchases were on commission for a Mr. McMurdy (R. 78). August 28 all of the McMurdy wool was taken out. Saturday afternoon, September 2, some wool was again bought and stored in the burned building for McMurdy. In the early morning of Monday, September 6, the fire occurred. All of Scott's records were destroyed. Cumberland, where the fire occurred, and where the chattel mortgage was executed, and where Bracken lived, was a small village of less than 2,000 population as shown by the census. Bracken had been at the storage place during the period involved 'several times to see Mr. Scott (the insured) on business.' The chattel mortgage executed June 19, was neither filed nor verified, wherefore it was at all times insufficient to protect Bracken's bank from intervening [illegible] of Scott.

"I draw no inferences from these facts [illegible]

1. That Scott was in losing and involved circum-

stances during the entire time; 2. That his condition was more or less obvious in this small community, especially known to Bracken, the active agent of his very large creditor, the bank; 3. That the latter, through Bracken, had an acute interest in protecting its numerous and, in the aggregate, large loans; 4. That Bracken, being at the same time in the business of loaning money and protecting the loans, and an insurance agent issuing the critical policies, presumably knew both how to protect his bank against the insurance companies in the use of an effective loss payable clause and, against Scott's creditors, what was necessary to be done with the mortgage; 5. That the moral hazard, always recognized in the arising of a mortgage lien, was intensified in this instance because of Scott's failing fortunes; 6. That significance attaches to the facts that the mortgage was not filed and that riders of the character shown in the records were used."

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in finding and holding, though the loss-payable clause by its express terms was subject to all the terms and conditions of the policy, and though the loss-payable clause contained no reference to chattel mortgage and no description of the payee as a chattel mortgagee or as having any interest whatever in the property, and though the loss-payable clause did not contain the words "as interest may appear", that nevertheless

the loss-payable clause in this case constituted a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage in the entire absence of pleading or proof of a course of dealing between the parties, or of usage, or custom, qualifying the unambiguous language used.

2. The Circuit Court of Appeals for the Sixth Circuit in its majority opinion erred in altering the clear and unambiguous language of the written insurance contract by a construction thereof based upon a supposed custom or usage assumed by the court, and for which there is no foundation either in the pleadings or the evidence or in point of fact.

3. The Circuit Court of Appeals for the Sixth Circuit in construing and declaring the effect of the clear and unambiguous language of the loss-payable clause and the policy in suit erred in this action at law, in which there was no pleading or proof of fraud or mutual mistake, in considering and giving effect to the claimed knowledge of this petitioner's local soliciting agent of the incumbrance by chattel mortgage, which knowledge was acquired in his capacity as cashier of the adversely interested payee bank, and was not communicated to the insurance company.

4. The Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that an insurance company has waived performance by the insured of the appraisal condition precedent of the policy when the insurance company has simply disagreed with the insured's claim as to the amount of the loss without dem-

ing liability prior to suit, and when subsequent to suit the insurance company has merely filed an answer alleging the defense of failure by the insured to perform this condition precedent as to appraisal of the amount of the loss, and alleging a further defense of incumbrance by chattel mortgage in violation of the terms of the policy.

V.

Summary of the Argument.

1. THE LOSS-PAYMENT CLAUSE RIDER WAS NOT A WAIVER OF THE PROHIBITED INCUMBRANCE BY CHATTEL MORTGAGE.

Point A. The provision in the policy prohibiting chattel mortgage without consent endorsed in writing thereon, intended as it is to reduce the moral hazard, is valid, and violation thereof by incumbrance of any of the property insured constitutes an entire defense.

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Mulrooney vs. Royal Insurance Co., 163 Fed. 833 (C. C. A. Iowa, 1908), First Syllabus, p. 835.

Hartford Fire Ins. Co. vs. Downey, 223 Fed. 707 (C. C. A. W. Va. 1915), Syllabus, pp. 712, 715.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schild, 69 O. S. 136.

National Fire Ins. Co. vs. Kneidel, 11 O. C. C. (N. S.) 193 (Hamilton County).

Hammel vs. Insurance Co., 24 O. C. C. 101 (Pickaway County).

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Point B. The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office, well known in insurance practice, of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

Atlas Reduction Company vs. New Zealand Ins. Co. (C. C. A., Judge Van Devanter), 138 Fed. 497-508.

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

Point C. Even though the loss-clause rider had contained the added words "as interest may appear", which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Insurance Co. (District Court, Southern District, Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A., Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

Point D. The absence in the loss-clause rider here in question of the phrase "as interest may appear" upon which alone the dissenting opinion in *Atlas Reduction Co. vs. New Zealand Ins. Co.*, 138 Fed. 487, and the other decisions cited by the majority, were based, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar wholly without precedent and in direct conflict with the controlling decision of this court in

Bates vs. Equitable Insurance Co., 10 Wallace, 77 U. S. 33.

1. IF, AS THE MAJORITY ASSERT, THE ABSENCE OF THE PHRASE "AS INTEREST MAY APPEAR" IS WITHOUT SIGNIFICANCE, THEN THE MAJORITY OPINION IN THE INSTANT CASE IS IN SQUARE CONFLICT WITH THE FOLLOWING CORRECTLY DECIDED CASES:

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla., 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Greer (C. C. A. Kansas, 1903), 120 Fed. 915.

Point E. Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," and that if insurance contracts

(as here) "are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

Insurance Co. vs. McNulty, 157 Fed. C. C. A. 224, 226.

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther (Decided Feb. 24, 1930), 281 U. S. 34.

Point F. The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with its clear wording, upon a supposed custom or usage assumed by the majority and for which there is no foundation in the pleadings or the evidence or in point of fact.

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Point G. The loss-clause rider in the instant case was not a waiver of the prohibited incumbrance by chattel mortgage because the loss-clause rider was not informative to the insurer of the existence of the inhibited lien, and the knowledge of the insurer's agent of such lien may not be imputed to his principal under this form of policy—no actual knowledge by the insurer being otherwise shown.

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33.

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

Northern Assurance Co. vs. Grand View Building Asso., 183 United States Reports, 308.
Lumber Underwriters vs. Rife, 237 United States Reports, 605.
Penman vs. St. Paul Fire & Marine Ins. Co., 216 United States Reports, 311 (1910).
Mutual Life Ins. Co. vs. Hilton Green, 241 United States Reports, 613.
Ætna Life Ins. Co. vs. Moore, 231 United States Reports, 543.
Prudential Insurance Co. vs. Moore, 231 United States Reports, 560.

Point H. Knowledge of the insurer's agent, Bracken, of the inhibited lien and his act in preparing this form of loss-clause rider may not be imputed to his insurance company principal for the additional reason that he was then acting in a dual, incompatible capacity for his bank principal, on the one hand, and for his insurance company principal, on the other.

Point I. The importance to the insuring public and to the insurance companies of an authoritative judicial declaration as to whether it is possible by the form of loss-clause rider here employed to secure a creditor of the insured who has no interest by way of mortgage or otherwise in the insured's property against the casualty of fire without thereby thrusting the materially increased hazard of chattel mortgage incumbrance upon the insurer, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict between the

Circuit Courts of Appeals, including the Judges of the Circuit Court of Appeals in the instant case.

2. NON-COMPLIANCE BY THE INSURED WITH THE CONDITION PRECEDENT REQUIRING APPRAISAL OF THE AMOUNT OF THE LOSS WAS A BAR TO THE INSURED'S RECOVERY.

Point J. The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of loss without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against incumbrance by chattel mortgage, did not waive its right to legal performance by the insured of the condition requiring an award of appraisers fixing the amount of the loss as a condition precedent to the insured's right of action on the policy.

Insurance Co. vs. Carnahan, 63 Ohio State 258.

Graham vs. Insurance Co., 75 Ohio State 374.

Edward Everett Co. vs. Great American Ins. Co., 9 Ohio *Nisi Prius* Reports (New Series) 241 (Affirmed 18 Ohio State 573).

Fire Association vs. Agresta, 115 Ohio State 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd) 754.

ARGUMENT.

1. The Loss-payable Clause Rider.

POINT A.

The policy provision prohibiting chattel mortgage without consent thereto endorsed in writing upon the policy is valid, and violation thereof constitutes an entire defense.

The insurance contract in suit expressly provides:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

The validity of this clause prohibiting incumbrance by chattel mortgage, and the proposition that violation thereof is an entire defense to any recovery on the policy, is settled by an unbroken line of decisions both by the Federal courts and the courts of Ohio.

Mulrooney vs. Royal Ins. Co. (C. C. A. Iowa, 1908), 163 Fed. 833.

(Page 835:)

> "That a mortgage of personal property increases the insurance hazard is not disputed. Provisions in insurance policies that a mortgage placed upon the property insured shall render the policy void unless consent of the company thereto shall be indorsed in writing upon the policy, are valid provisions. Atlas Reduction Co.

v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 777, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Assurance Co. *v.* Bldg. Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases therein cited."

As this court held in

Carpenter vs. Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 510,

"the underwriters did not rely so much upon the principles as upon the interest of the insured."

To the same effect are:

Hunt vs. Springfield Fire & Marine Ins. Co., 196 U. S. 47.

Hartford Fire Ins. Co. vs. Downey (C. C. A., W. Va., 1915), 223 Fed. 707, 712, 715.

Webster vs. Dwelling House Ins. Co., 53 O. S. 558.

Ohio Farmers Ins. Co. vs. Titus, 82 O. S. 161.

National Fire Ins. Co. vs. Kneidel, 11 Ohio Circuit Court (N. S.) 193, Hamilton County.

Hammel vs. Ins. Co., 24 Ohio Circuit Court, 101, Pickaway County.

Hartford Fire Ins. Co. vs. Jones, 15 Fed. (2nd) 1 (6 C. C. A. 1926).

Germania Fire Ins. Co. vs. Schield, 69 O. S. 136.

POINT B.

The loss-payable clause of the form here employed, by its language, is not informative to the insurer of the existence of the prohibited chattel mortgage, but simply performs the office well known in insurance practice of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

It is the unquestionable legal right of an insured to select and nominate for coparticipation in the proceeds of his contract a person who has no interest of any kind in the insured property. When that is done, the insurer is called upon only to consider in case of loss whether it will honor such appointment. As held in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497:

> "Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, skill, and success in trade, but who requires some indemnity against such accidents as loss by fire."
>
> "It is not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss."

See also

Bates vs. Equitable Ins. Co., 10 Wallace, 77 U. S. 33,

and minority opinion by Judge Killetts in the instant case (R. 236, last paragraph, and R. p. 244).

POINT C.

Even though the loss-clause rider had contained the added words "as interest may appear," which are pointedly absent from the loss clause involved in the instant case, such loss-clause rider would not have constituted a waiver of the prohibited incumbrance by chattel mortgage.

The exact language of the loss-payable-clause rider in the case at bar is as follows (R. 127):

> "Any loss under this policy that may be proved due shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The provisions of the policy pertinent to this discussion are the following, as quoted in the dissenting opinion (R. 233):

> "1. This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such pro-

visions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

"2. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

"3. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply to the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

It was squarely held in

Atlas Reduction Co. vs. New Zealand Ins. Co., (Majority opinion by Judge Van Devanter), 138 Fed. 497,

as to a loss-clause rider identical with that in the instant case, except that the rider there contained the additional words "as interest may appear," which are significantly absent here, that—

"(e) The endorsement does not give consent to the incumbering of the insured personal property by a chattel mortgage (1) because it does not mention a chattel mortgage, or describe D. & S. as chattel mortgagees, or show

that the attention of the parties was directed to a chattel mortgage; (2) because it was not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss; and (3) because the words 'subject to all the conditions of this policy' show that the conditions were not intended to be abrogated or waived, but to have effect and be respected as if the indorsement had not been made, and among the conditions of the policy are these: 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage * * * and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy * * * unless such waiver, if any, shall be written upon or attached hereto."

and (Opinion, p. 503)—

"that the indorsement did not in terms or by implication consent to the incumbrance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance."

To the same effect are:

Bank vs. Hartford Fire Ins. Co. (Dist. Court, S. D. Fla. 1924), 1 Fed. (2nd) 43.

Delaware Ins. Co. vs. Green (C. C. A. Kansas, 1903), 120 Fed. 916.

Erie Brewing Co. vs. Ohio Farmers Ins. Co., 81 O. S. 1, 19-20.

POINT D.

The absence from the loss-clause rider here in question of the phrase "as interest may appear," upon which was based the dissenting opinion in the Atlas Reduction Co. Case, 138 Fed. 497, and the other decisions cited by the majority of the Circuit Court of Appeals, leaves the decision of the majority of the Circuit Court of Appeals in the case at bar without precedent and in direct conflict with a controlling decision of this court.

This proposition cannot be more admirably stated than in the language of Judge Killetts in his able dissenting opinion in the case at bar (R. 234-235; 236-238):

> "In the Atlas Case (138 Fed. 497) the rider waiver, whose sufficiency was questioned, was: 'Subject to all of the conditions of this policy, loss, if any, payable to D. & S. as their interest may appear.' The majority holding was that this language did not 'in terms or by implication consent to the incumbrance created by the chattel mortgage.' Judge Hook, dissenting, held, that (page 514), among other things, notice might be taken that according to usage and custom the phrase 'as interest may appear' was used in such cases to refer to a chattel mortgage interest. This Court (Sixth Circuit) in Commercial Union Insurance Company v. Marshall, 18 Fed. (2) 457, 458, 459, where the rider was: 'any loss * * * proven to be due to the insured on this policy shall be held payable to D.

interest may appear', indicated its preference for Judge Hook's reasoning and conclusion, but found that it 'expressly appeared', in the record before it, 'that according to the usages and practices of the community and of these insurance companies, this phrase "as interest may appear" was understood to cover and include a chattel mortgage interest, and was in the form of words in a printed rider regularly used by the insurance companies for covering and describing that kind of interest.' It was also held, independently of Judge Hook's view in the Atlas case, that 'the stipulation that the loss should be payable to Dacus "as interest may appear" * * * applied to his interest, whatever it was, and was notice to and recognition by the insurer of his interest in the property, then or thereafter.'

"In Firemen's Insurance Company *v.* Brooks, also by this Court, 32 Fed. (2nd) 451, the rider was, page 451, 'Any loss * * * shall be payable to Thomas Trimby, as interest may appear, subject, nevertheless, etc.' In that decision this Court squarely followed Judge Hook in the Atlas case, adding, page 452:

"If there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is, at least, not clear that the language used might not have been intended to refer to that very interest which Trimby in fact had in the property, and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." * * *

"The foregoing concerning Judge Hook's

position in the Atlas case, and the view of this Court (Sixth Circuit) in the Marshall and Brooks cases, shows conclusively that the controlling fact in each was the phrase 'as interest may appear' in the waiver rider. In each the discussion centers around it and the final conclusion depends entirely upon its interpretation and the effect thereof: These cases are not unique in this respect. Citation may be multiplied to show that its use is of the utmost importance to safeguard an interest which otherwise might work to avoid the contract, its presence, at least, rendering the alleged waiving rider or indorsement ambiguous, permitting the rule of construction to operate when ambiguity is present.

"It is clearly established, and no longer controvertible, that the insured may select and nominate, for co-participation in the proceeds of his contract, a person who has no interest of any kind in the corpus of the insured property, and that when that is done the insurer is called upon only to consider whether in case of loss it will honor such appointment. This was clearly recognized by both sides of the division in the Atlas majority opinion, page 508, minority opinion, page 509, et seq. 138 Fed., and also by this Court in the Brooks decision in the paragraph last quoted. See also, the Bates case, infra. Judge Hook, in the Atlas minority opinion, with that in mind, also applied the rule of construction followed by Judge Denison in the Brooks opinion where ambiguity exists, finding such ambiguity in the waiver rider then before him, wherefore he saw an occasion to examine into the intent of the contracting parties,

while conceding (page 513) that it cannot be said that there is room to resort to an inquiry into intent 'where plain and unequivocal language is employed'.

"I have dwelt at this length upon the three decisions involved in the preceding discussion because the majority cites them in support of its position, whereas, in my view of their respective facts and the acute issue involved in each, together with the manner in which, in each, its solution was attained, they negative the conclusions of the majority.

"Aside from another matter, to be discussed later, there are three outstanding differences, plainly shown by comparison of the records, distinguishing the three cases in question.

"First, the wording of the alleged waiving rider we are considering. This is startlingly inadequate to be supported by any of the 'as interest may appear' decisions, for that important phrase is entirely absent. Its wording is: 'Any loss under this policy that may be proved due the assured shall be payable to the assured and The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy.'

"Secondly, there is not the slighest attempt, in the instant case, to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used.

"Thirdly, there was no attempt here to show, what apparently was on the record in Marshall's case, *supra*, that the rider is 'in the form of words in a printed rider regularly used by the insurance companies for covering and describ-

ing that kind of interest,' i. e., chattel mortgage interest.

"In short, the records this Court is considering are so meagre as to allegation, proof or attempt to prove, that, in my view, we are forced, majority and minority, to judge the effect of this attachment to the several policies, by considering the naked language used, and the quoted stipulations which the majority considers it to qualify—these three factors and, absolutely nothing else."

The decision of the majority of the Circuit Court of Appeals in the instant case is therefore wholly without the support of precedent, and in fact is in direct conflict with the law as settled by this court in *Bates vs. Equitable Insurance Co.*, 10 Wallace, 77 U. S. 33,

where, as in the case at bar, there was no attempt to allege or prove, aside from its own terms, with what intent or to serve what purpose the rider was used, and where, as in the case at bar, there was no attempt to show what was in the record in the *Marshall* case (18 Fed. (2nd) 457), relied upon by the majority, namely, that the rider here used is "in the form of words in a printed rider ordinarily used by the insurance companies for covering and describing that kind of interest" that is, chattel mortgage interest.

The policy in the *Bates* case provided that if the property were sold the insurance ceased unless the insurer consented in writing, and it was held by this Court that an endorsement on the policy that the

policy was "payable in case of loss to E. C. Bates," followed by the insurer's endorsement that "consent is hereby given to the above endorsement," did not imply either knowledge or consent to a sale of the insured property. In that case the property had been sold to Bates, the appointee. In that case, as here, there was, as noted by Justice Miller, page 37 of the report, no proof of a course of dealing between the parties or a usage and custom which qualified the language used, wherefore this Court saw in the language used "nothing more than the direction of Philbrick (the insured) and the consent of the company that any loss sustained by Philbrick, covered by that policy, should be paid to Bates."

As to the *Bates* case the majority of the opinion of the Circuit Court of Appeals in the instant case says:

> "In that case there was no evidence 'outside of the two indorsements * * * that there was any consent to accept Bates, the purchaser, as the party whose interest was insured,' and hence the question became determinable upon implications arising from the indorsements alone. It was pointed out in that case, however, that if it had been shown that it had been the course of dealing between the parties to recognize the indorsement of the party first assured as evidence of a sale or the indorsement of the company as a consent to the sale, or if it had been shown that by custom and usage in any particular place such indorsements were so treated, 'the case might be different.'"

As stated by Judge Killetts in the dissenting opinion in the instant case (R. 243):

"In the instant cases there are none of the qualifications, such as are referred to in the foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the Bates case, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.''

POINT D-1.

If it be assumed, as asserted in the majority opinion of the Circuit Court of Appeals in the instant case (R. 227), that the absence from the loss-clause rider in the instant case of the words "as interest may appear" is immaterial, then the majority opinion in the instant case is, as it professes to be (R. 228), in square conflict with the unanswerable majority opinion of Judge Van Devanter in

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

POINT E.

Since the loss-payable-clause rider here does not contain the phrase "as interest may appear," the rider and policy are both entirely clear and free from ambiguity, and the majority opinion in this case has therefore violated the rule that it is not permissible for a court by construction to declare and "make a plain agreement ambiguous and then to interpret it in favor of the insured," but that, if insurance contracts, as here, "are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

The only clause in any form of loss-payable rider considered in any of the cases referred to in the majority and dissenting opinions of the Circuit Court of Appeals in the instant case which has been asserted by any Judge to be even potentially ambiguous is the clause "as interest may appear." Even the majority, in its opinion, in the instant case, does not venture to assert that the loss-clause rider here in question, from which the parties have deliberately eliminated the phrase "as interest may appear," is ambiguous or fairly susceptible, from its own language alone, of the construction that it is intended as a consent to the prohibited chattel-mortgage lien. On the contrary, the clear language is that "any loss under this policy *that may be proved due* shall be payable to the assured and the Cumberland Savings Bank Company, Cumberland, Ohio, *subject, nevertheless, to all the terms and conditions of the policy.*"

Because these insurance contracts are thus clear and unambiguous, they are "to be construed according to the sense and meaning used, and if they are clear and unambiguous, their terms to be taken and understood in their plain, ordinary and popular sense," as held by this Court in

Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 463.

U. S. Fidelity & Guaranty Co. vs. Guenther, 281 U. S. 34 (decided Feb. 24, 1930).

The rule that where the insurance contract is fairly susceptible of two different constructions, that one will

be adopted which is favorable to the insured, "ought not to be permitted to have the effect (as in the majority opinion in the case at bar) to make a plain agreement ambiguous and then to interpret it in favor of the insured."

Insurance Co. vs. McNulty, 157 Fed. (8 C. C. A.), 224, 226.

In the language of Judge Killits in his dissenting opinion in the instant case:

> "My conclusion, based on what seems to me to be the unambiguous character of its language to merely appoint the bank as a co-participant with Scott in recovery on the policies, and its utter lack of informing quality that the moral hazard of a mortgage lien attends the risk, is obstinate that the majority has failed to observe the rule laid down by Judge Hickenlooper, in the Guenther case, referred to at the opening of this opinion, equally applicable to the construction of an effort to work a waiver of the provision for defeasance in case of a lien increase in the risk, that 'resort cannot be had,' in a case such as here, to the rule respecting resolution of ambiguities, because there is here no 'double meaning' for that here the language used will not 'fairly and reasonably support that construction upon which liability of the insurer may be sustained.'"

POINT F.

The majority opinion in this case has erred in basing its construction as to the meaning and effect of the loss-clause rider, in conflict with the rider's clear wording, upon a supposed custom or usage assumed by the court, and for which there is no foundation in the pleadings or in the evidence or in point of fact.

It is only where the possibly ambiguous phrase "as interest may appear" or other ambiguous language is employed in the loss-payable clause or policy, that a pleading and proof of a custom or usage that the phrase "as interest may appear" was understood to include a chattel-mortgage interest would be relevant to aid in a construction of the contract. In the absence of ambiguity and of such pleading and proof of custom or usage, the construction of the policy-and-loss clause must be "determinable upon the implications arising from the endorsements alone."

Bates vs. Equitable Insurance Co., 77 U. S. (10 Wall.) 33.

Here the loss-clause rider contains no such phrase "as interest may appear."

Here there is no ambiguity of any kind.

Here there is no pleading or proof of custom or usage.

On the contrary, as said by Judge Killits in the instant case in his dissenting opinion:

> "In the instant cases there are none of the qualifications, such as are referred to in the

foregoing quotation, because of which 'the case might be different,' wherefore, here, as in the *Bates case*, 'the question becomes determinable upon implications arising from the indorsements (rider) alone.' "

Yet the majority Circuit Court of Appeals opinion, in the instant case, only achieves a holding that "the purpose in attaching them (the loss-payable-clause riders) was to grant authority to encumber the property by chattel mortgage"—

(1) By assuming an ambiguity which does not exist in the language, and

(2) By assuming a usage or custom that the loss-payable-clause rider, as here, phrased without the words "as interest may appear," was understood to permit chattel-mortgage encumbrance, though such assumed custom is neither pleaded, nor in proof, nor is in accordance with the actual facts.

POINT G.

The loss-payable rider was not a waiver of the prohibited encumbrance by chattel mortgage, because by its language it was not informative to the insurer of the existence of the inhibited lien, and knowledge of the insurer's agent may not be imputed to his principal under this form of policy, no actual knowledge by the insurer being otherwise shown.

The policy provision (hereinbefore quoted) in the instant case limiting the validity of waivers and modifications of the contract to such waivers as are en-

dorsed in writing upon the policy has frequently been construed by this Court.

Under that provision, an endorsement or rider claimed to work a waiver, as provided in that stipulation of the policy, must be so worded that the acceptance of it by the insurer should be regarded *as an agreement* to continue the contract in spite of the otherwise voiding presence of a mortgage lien; that is, that the situation shall involve at least an implied consent that an interest shall exist in favor of a mortgagee.

The construction and effect of that provision was settled by this Court in

Insurance Co. vs. Grandview Building Assoc.,
183 U. S. 361,

where it was held that the

> "limited grant of authority (to waive) is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied upon the plaintiff must show that the company, *with knowledge of the facts that occasioned the forfeiture*, dispensed with the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had *express authority* from the company to make the waiver, or that the company, *with knowledge of the facts*, ratified the action of the agent."

It follows, from this decision, that in the absence of actual knowledge by the insurer, otherwise shown, the alleged waiving indorsement or rider must be informative of the existence of the inhibited lien, and that knowledge of the insured's agent, not communicated to his principal, may not be imputed to the insurer.

The doctrine of the Grandview Building Association case has been repeatedly reaffirmed by this Court.

Lumber Underwriters vs. Rife, 237 U. S. 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Co., 216 U. S. 311 (1910), Syl. and pp. 321, 322.

Mutual Life Insurance Co. vs. Hilton Green, 241 U. S. 613, 624 (1916).

Ætna Life Insurance Co. vs. Moore, 231 U. S. 543, 559 (1913).

Prudential Insurance Co. vs. Moore, 231 U. S. 560, Syl. 3 (1913).

The loss clause neither describes the payee as mortgagee, nor by words or intimation in any manner mentions chattel mortgage. The clause here, therefore, clearly is not informative to the insurer to the existence of the inhibited chattel mortgage, but performs an entirely different office well known to insurance practice, of appointing a person having no interest in the insured property to participate in the policy's proceeds.

Under the non-waiver clause of the insurance contract, knowledge by the insurer's agent of the prohibited chattel mortgage is not imputed to the insurer.

There is no proof whatever that the insurance company itself knew of the mortgage, or had the slightest hint that the bank was interested in the insured property in any way. Nor is there any proof, or even pleading, that it was intended by this phraseology of the loss-clause rider to convey such information to the insurer or to have the rider work a waiver of the defeasance clause in the contract.

In the face of these undisputed facts, and the entire lack of ambiguity in the contract, and in the face of this rule settled by this Court [illegible] imputation of the agent's knowledge, the majority of the Court of Appeals, in its opinion, holds that "the endorsements (loss-payable riders) were intended to authorize the encumbrance of the property by chattel mortgage", and bases that holding on the further assertion that "in this case it clearly appears that the endorsements were made with full knowledge of the facts".

In the unanswerable language of Judge Killits in the dissenting opinion (R. 244):

> "Even if Bracken's acts in attaching the rider should be imputed to the insurers in spite of his adverse interest, in the performance of those acts, as the managing agent of the beneficiary of the riders, still in face of the imminent doctrines of the Northern Assurance case that his knowledge is not that of the insurers and that definite provisions of the contracts as to the character of the waiver as a carrier of information such as we have must be honored, it is of no importance as these records stand. The question is not decided by what Bracken knew or intended or both. It is the

matter of what knowledge the insurers had of the purpose of the riders that counts."

POINT H.

Knowledge of the insurer's agent, Bracken, of the inhibited lien when he attached the rider, and his act in employing this form of rider, may not be imputed to his insurance company principal; for the additional reason that Bracken was acting in a dual incompatible agency for his bank principal on the one hand, and for his insurance company principal on the other.

It cannot be said in this case that the production and attachment of the closs-clause riders employed in this case by Bracken was the act of his insurance company principal, because of the incompatible duality of representative obligations of Bracken, cashier of the payee bank. These obligations were then wholly incompatible. His activity in increasing the moral hazard through the chattel mortgage was for the advantage of his bank principal, and correspondingly to the disadvantage of his insurance company principal. This incompatible duality makes it impossible to attribute to the insurer any act of his which favored either the bank, or the insured through the bank.

Mulrooney vs. Insurance Co., 163 Fed. 133, 135 (9 C. C. A.).

American Surety Co. vs. Pauly, 170 U. S. 133.

POINT I.

The great importance to the business world, the insuring public, and the insurance companies of an authoritative judicial determination of the legal effect of the loss-clause rider here employed calls for a review and final determination of this case by this Court, and particularly so in view of the direct conflict of opinion between various Courts of Appeals and the Judges of the Court of Appeals in the instant case.

It is of vital importance to the insuring public to be able, as security for indebtedness due from the insured, to designate a creditor who has no interest in the insured property as payee in case of fire loss, without thereby assuming the greatly increased premium expense properly chargeable to the materially increased hazard incident to a permitted encumbrance by chattel mortgage.

It is likewise of vital importance to the insurance companies to know whether, by use of the particular form of loss-clause rider here employed, the purpose thereof has been accomplished by permitting this highly desirable commercial transaction without thereby imposing upon the insurance company the material increase of hazard of chattel mortgage encumbrance. As this Court held in

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively

small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. * * * If the insured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the insured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

POINT J.

The insurer, by disagreeing with the insured under non-waiver agreement as to the amount of the loss, without denial of liability, and by filing an answer after suit averring the defense of failure by the insured to perform the condition precedent as to appraisal, and the further consistent defense of violation of the policy inhibition against encumbrance by chattel mortgage, did not waive its right to require performance by the insured of the condition requiring an award of appraisers fixing the amount of loss as a condition precedent to the insured's right of action on the policy.

The validity or interpetation of an insurance con-

tract—as distinguished from the question as to what constitutes waiver or modification thereof—is governed by state law.

Hartford Fire Ins. Co. vs. Nance, 12 Fed. (2d) 575, 576.

Carpenter vs. The Providence Washington Ins. Co., 41 U. S. (16 Peters) 495, 511, 512.

Ætna Insurance Co. vs. Moore, 231 U. S. 543.

Liverpool and Great Western Steam Co. vs. Phœnix Insurance Co., 129 U. S. 397, 443.

It is the settled Ohio rule of construction of the standard fire insurance policy here involved, binding on the Federal courts, that the condition of the insurance contract requiring the amount of loss to be fixed by a board of appraisers in the event of disagreement between the insured and the insurer as to the amount of loss, is a condition precedent, the performance of which is mandatory upon the insured before a cause of action against the insurer on the policy matures.

In *Graham vs. Insurance Co.*, 75 O. S. 374, it is held in the first syllabus (which is controlling in Ohio):

> "* * * such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss, except as such condition is modified as to a total loss (to real estate) by Section 3643, Revised Statutes; and in a suit to recover such a loss, in the absence of an award of appraisers,

and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown."

To the same effect is

Insurance Co. vs. Carnahan, 63 O. S. 258, Syllabus 5.

The majority of the Circuit Court of Appeals in its opinion disposes of the defense of plaintiff's failure to obtain an award of appraisers in the following language:

"There was no arbitration, and no steps were taken by the plaintiff to bring one about. Hence it is contended by the insurance companies that the present suits cannot be maintained. We do not agree with the contention. The contracts of insurance did not provide for arbitration of the question of liability but of the amount of loss in case of disagreement. The defendants denied liability before suit was brought and after it was brought. Their defense went to the question of liability, not to the amount of loss. The arbitrational question, therefore, was never reached, and the defendants did not permit it to be reached. In this situation they cannot say that suits on the policies cannot be maintained."

The sole ground of the majority's holding that the plaintiff's failure to obtain an award of appraisers was not a bar to his recovery is thus the assumption of the majority that—

"The defendants denied liability before suit was brought and after it was brought."

This is an assumption in direct conflict with the facts in the record.

An examination of the record will disclose that the question of liability or non-liability by the insurance company was never discussed, before suit was brought, between the plaintiff and defendant either orally or by writing. The only witness who testified as to any oral conversation with the adjuster of the company after the loss was the plaintiff himself, who testified that the conversation was under non-waiver agreement (Ex. 7, R. 141), and nowhere in his testimony does he claim or even intimate (R. 75, 78) that the adjuster of the insurance companies ever at any time denied liability. The only communication in writing from the insurance company to the plaintiff, appellee, prior to suit, was the letter of November 24, 1926, in which the insurance company set forth the respects in which the proofs of loss furnished by the insured did not conform to the requirements of the policy, and in which the company expressly disagreed with the plaintiff as to the amount of the loss. This letter appears as "Exhibits 19, 22 and 23" (R., pp. 198, 202, 203). On its face this letter shows that it does not contain or purport to contain any denial of liability.

As held in *Orenstein vs. Star Ins. Co. of America*, 10 Fed. (2d) 754:

> "Syl. 2. Insurer did not waive defense of increase of hazard by not denying liability on this account, when rejecting proofs of loss on the ground that they did not correctly state the loss; there being then no denial of liability on

any ground, and the rejecting being but an 'action taken' relative to the amount of loss, within the prior non-waiver agreement of the parties, expressly preserving insurer's rights and defenses from loss by waiver."

Page 757:

"Defendants did not deny liability on the policy when rejecting the proofs of loss upon a different ground from that set up in the answer. *They did not deny liability at all. They simply rejected the proofs submitted, on the ground that they did not correctly state the loss.* This could not amount to a waiver because the rejection of the proofs of loss was an 'action taken' under the terms of the non-waiver agreement quoted above, which expressly preserved defendants' rights and defenses. * * *

"The execution of the non-waiver agreement was in itself notice that the defendants might assert defenses against the policies. The fact that the defendants did intend to assert such defenses could not possibly preclude them from insisting that any action taken under the non-waiver agreement be taken in accordance with the terms and provisions of the policies or from insisting on a forfeiture in case of a breach of its conditions."

This rule likewise prevails in the courts of Ohio, as held in *Edward Everett Co. vs. German American Ins. Co.*, 9 Ohio *Nisi Prius* (N. S.), 241 (affirmed 81 O. S., [illegible]):

Syl. "A reply by an insurance company to a proof of loss, that it has reason to believe the

> cash value of the loss was much less and the salvage much more than claimed by the insured, *is not a denial of liability* by the company or a waiver of the provision of the policy for an appraisal, but amounts to a disagreement with the insured as to the amount of loss sustained and calls for an appraisal, and in a subsequent action on the policy it is not competent for the insured to give his reasons for not demanding an appraisal."

The Circuit Court of Appeals is therefore clearly in error in stating as the ground of its majority decision that "the defendants denied liability before suit was brought."

After suit was brought, the record shows that the only step taken by the defendant was to file its answer, in which the defendant, as permitted by the statutes of Ohio, set forth as many consistent defenses as it had, including the defense of plaintiff's failure to secure an award of appraisers, required as a condition precedent in the contract, and including also plaintiff's violation of the condition prohibiting incumbrance by chattel mortgage.

The Ohio statute in this connection, Ohio General Code 11315, is as follows:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer."

A denial of liability made after suit is brought, whether in a pleading or otherwise, could not induce the insured to believe that his performance of such condition precedent would be futile, because the commencement of the action fixes the rights of the parties as to performance or non-performance of such conditions precedent to the maturing of a cause of action.

The holding of the Circuit Court of Appeals majority on this point nullifies the statutory permission given a defendant under the statutes of Ohio to set up as many consistent defenses in his answer as he may have, and is in direct conflict with the law of Ohio as settled by the following decisions:

Insurance Company vs. Carnahan, 63 O. S. 258:

Syl. 7. "Under Revised Statutes, Section 5071 (Gen. Code 11315), a defendant may set forth in his answer as many grounds of defense, counter-claim or set-off as he may have, provided that they are so far consistent that they can be verified by oath without swearing falsely; and within the limits of that section, an insurer may join in his answer a defense that the insured has not performed a condition precedent as to arbitration or appraisal of the amount of the loss, with other defenses which, if successfully maintained, would discharge the insurer from liability altogether."

To the same effect is

Fire Association vs. Agresta, 115 O. S. 426, 430.

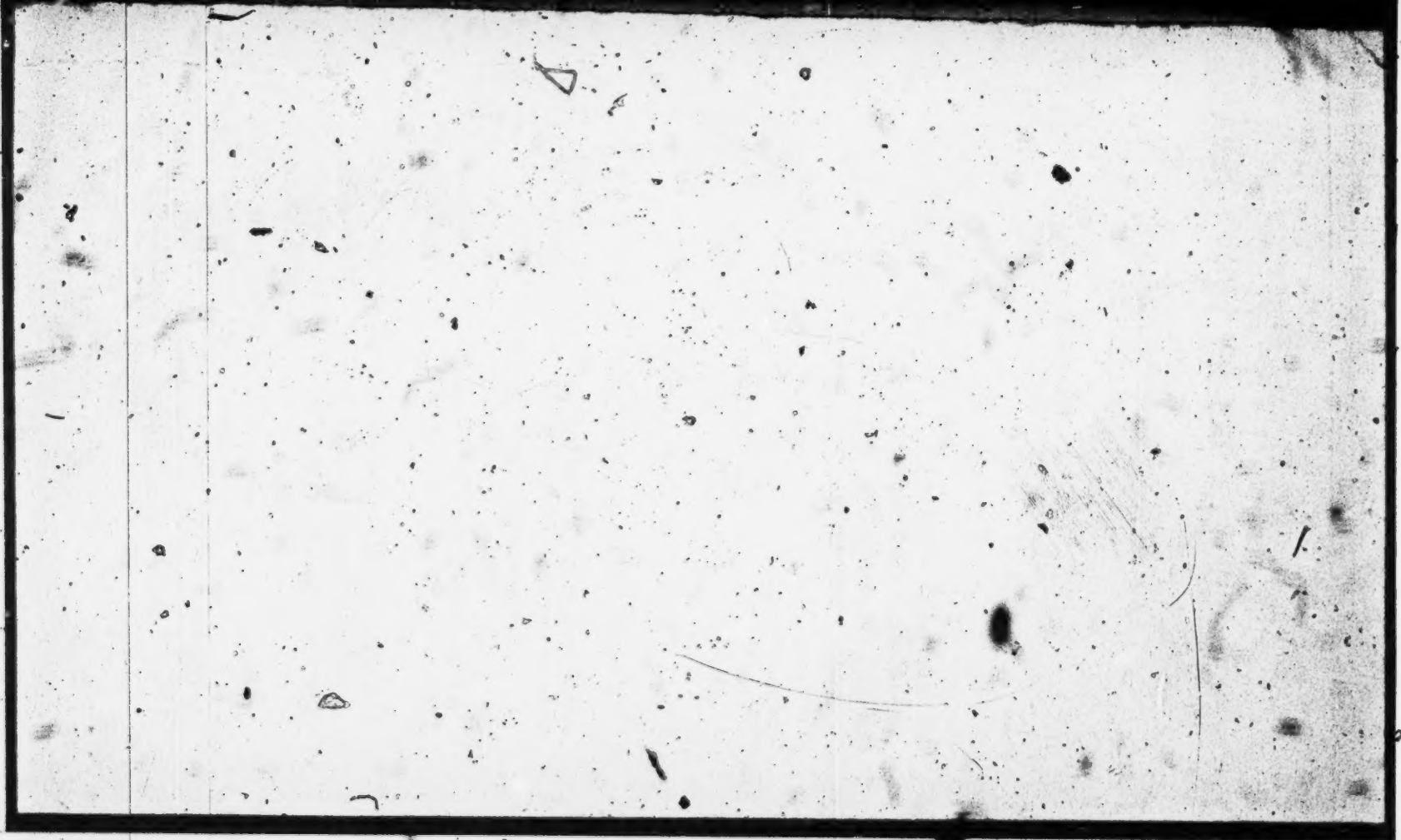
The majority of the Circuit Court of Appeals therefore has committed clear and prejudicial error in dis-

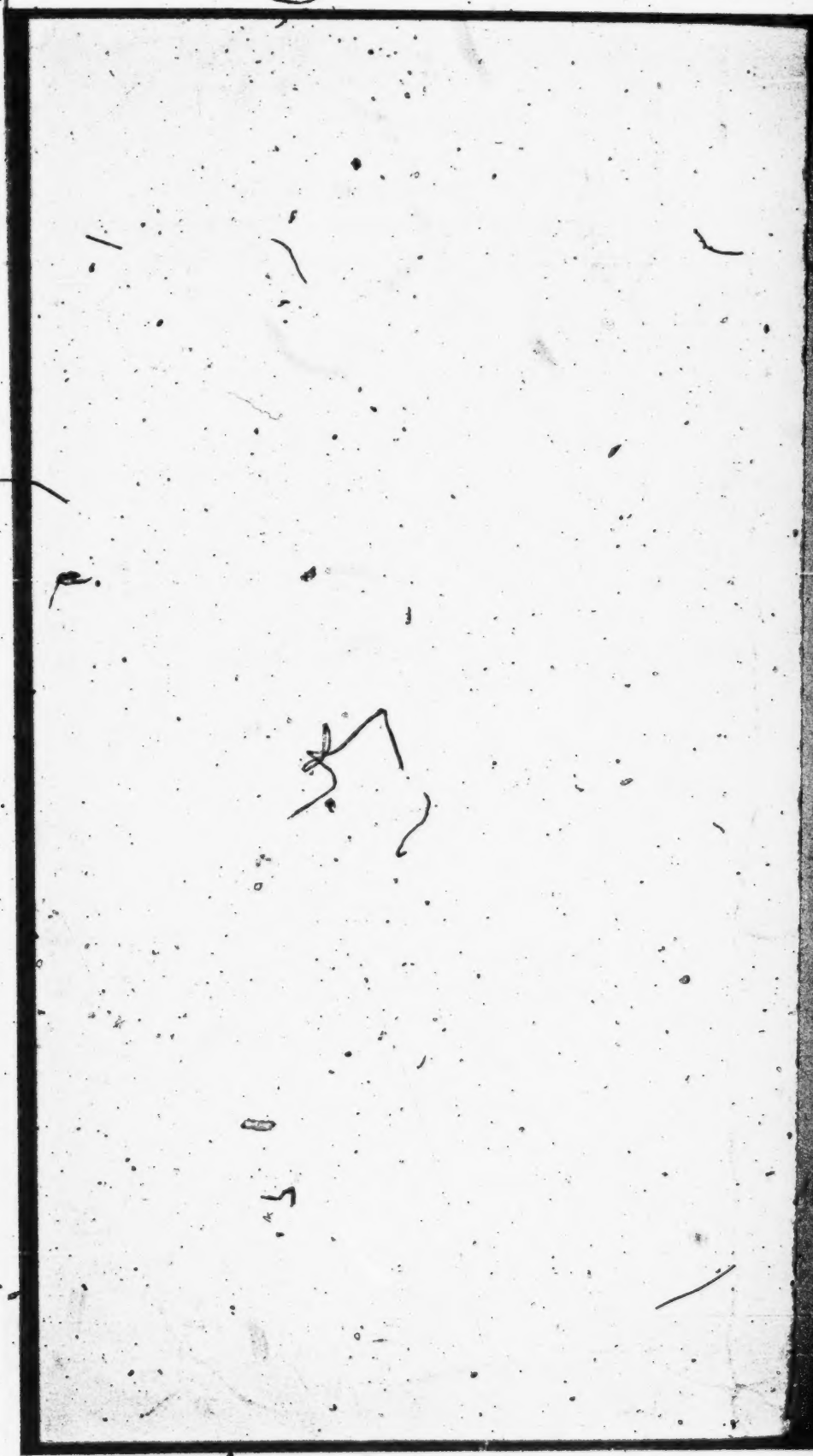
posing of the appraisal defense on the erroneous
sumption that "the defendants denied liability bef
suit was brought and *after it was* brought".

Conclusion.

It is, therefore, respectfully submitted that this c
is one calling for the exercise by this Court of its
pervisory powers in order that conflicts between de
sions of various circuit courts of appeals, and betwe
the decision of the majority of the Circuit Court
Appeals in the instant case and the decisions of o
Court be avoided, and to that end that a writ of c
tiorari should be granted, and that this Court shou
review the decision of the Circuit Court of Appe
for the Sixth Circuit in this case and finally rever
said decision.

ROLLAND M. EDMONDS,
Counsel for Petitioner





SUPREME COURT OF THE UNITED STATES.

Nos. 28, 29 and 30.—October Term, 1931.

28	Sun Insurance Office, Petitioner, *vs.* J. M. Scott.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
29	Norwich Union Fire Insurance Society, Ltd., Petitioner, *vs.* J. M. Scott.	
30	The Home Insurance Company of New York, Petitioner, *vs.* J. M. Scott.	

[November 23, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondent instituted five actions in a common pleas court in Ohio on as many policies of fire insurance. The causes were removed to the District Court for Southern Ohio, where they were consolidated, tried together, and resulted in verdicts and judgments for respondent. On appeal two of these judgments were reversed, and the three here under review were affirmed.[1] We granted certiorari.[2]

Each suit seeks recovery upon a fire policy issued upon wool belonging to respondent. In each, defense was made that he placed a chattel mortgage on the property in violation of a provision of the policy as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be . . . personal property and be or become incumbered by a chattel mortgage."

[1] 42 F. (2d) 10.
[2] 283 U. S. 814-815.

It is admitted that on June 19, 1926, the respondent executed a chattel mortgage on the insured property to a bank, and that the mortgage continued in force at the time of the fire. The policies of the Sun Insurance Office and the Norwich Union Fire Insurance Society, Ltd., were issued on June 14, 1926. That of The Home Insurance Company of New York bore date July 6, 1926. Each of the policies had attached to it a "loss payable clause" reading substantially as follows:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

These riders were attached by the local agent of petitioners, to the Sun and Norwich policies after their issuance, and to the Home policy on the date it was issued.

To the petitioners' defense of violation of the chattel mortgage clause, the respondent answered that the loss payable clause, as a matter of law, constituted a waiver and a recognition of the interest of the bank as chattel mortgagee. He averred, moreover, that by custom in the community in which the policies were written such clause was so understood and was customarily used for the purpose of giving the insurers' consent to chattel mortgages. In the alternative he insisted that under § 9586 of the Ohio General Code a person who solicits insurance and procures the application therefor must be held to be the agent of the party, company or association thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding; and that if the loss payable clause did not have the effect for which he contended, nevertheless the agent who wrote the policies and attached the clause knew of the existence of the chattel mortgage, and his knowledge was to be imputed to the insurers and constituted an agreement on their part that notwithstanding the mortgage the insurance should remain in force.

To this petitioners replied by denying any such custom as was alleged, and quoted a provision appearing in each of the policies that "no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of

agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

The Court of Appeals held that under the law of Ohio the chattel mortgage was valid as between respondent and the bank, and would have avoided the policies except for the loss payable clause, which it held either by its own force or by its customary use for the purpose constituted a waiver and consent on the part of the insurers. On this ground it affirmed the judgments.

We are of opinion that upon the uncontradicted facts the petitioners made out a valid defense to the suits and were entitled to directed verdicts in their favor. The provision in the policies prohibiting chattel mortgages without consent endorsed on the policy is intended to reduce the moral hazard, and is a valid stipulation, the violation of which constitutes a complete defense. *Hunt* v. *Springfield Fire & Marine Insurance Co.*, 196 U. S. 47. The loss payable clause above quoted is not informative to the insurer of the existence of a chattel mortgage, but performs the office of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

In *Bates* v. *Equitable Insurance Co.*, 10 Wall. 33, a policy contained a covenant that if the property were sold the insurance should cease unless consent of the insurer to the sale were given in writing. The policy was endorsed, "payable, in case of loss, to E. C. Bates", to whom it appeared the insured goods had been sold. There was no evidence except the endorsement of any consent to accept Bates, the purchaser, as the party whose interest was insured. It was said of the practice of making such loss payable endorsements:

"It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. . . .

"In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser."

We are of opinion that the doctrine announced in the *Bates* case is controlling here; that the attachment of a loss payable clause is entirely consistent with the condition against change of interest, or encumbrance of the insured property, and does not constitute a waiver of the condition against sale or mortgaging, or a consent thereto.

We find nothing in the record evidencing any customary use in the community where the policies were written of a loss payable clause as a consent to change of title or encumbrance of the subject-matter of the insurance, beyond the fact that in the three instances in question the agent of the insurers did, with alleged knowledge of the chattel mortgage, attach to each of the policies a loss payable rider. This is clearly insufficient to establish a custom or to change the normal office of such an endorsement.

The respondent insists that laying the loss payable endorsement out of view, the uncontradicted evidence that Bracken, the insurers' local agent, knew of the chattel mortgage, constitutes a consent on the part of the insurers that the policies should remain in force notwithstanding the encumbrance. He claims that for this purpose the knowledge of the agent is that of his principals. Reliance is placed upon § 9586 of the Ohio General Code, which makes a person who solicits or takes an application for insurance the agent of the company, "anything in the application or the policy to the contrary notwithstanding". He asserts that the decisions of the Ohio courts interpreting this statute are to the effect that the agency thus imputed to the solicitor extends to all matters of contract with respect to the policy, including consent to the alteration of its terms.

On its face the statute does not go so far. We have examined the authorities cited and fail to find that they give it any such force or effect.[1] They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. In the present cases

[1] *Foster* v. *Insurance Co.*, 101 Ohio St. 180; *Glass* v. *Insurance Co.*, 117 Ohio St. 145.

the policy limits its scope, and we think the written contract must control.

For the reasons given it is clear that the petitioners did not waive the condition against encumbrance nor consent to the giving of the chattel mortgage, and that there was nothing in the situation which deprived them of their defense based upon that condition.

In the petition for the writ of certiorari and in the argument other defenses made by the petitioners, which the courts below overruled, were pressed upon us. It is unnecessary to consider them, as what we have said disposes of the cases.

The judgments must be reversed and the causes remanded for further proceedings in accordance with this opinion.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.